mation that will show the court is mistaken. The information offered to the court in this case was that of lawyers, all prominent and some eminent in the profession in Oklahoma, who testified under oath that the case had not been accepted by the profession. Testimony was also offered to the effect that various District and County Judges had refused to follow the opinion. The writer believes that this evidence should have been received. The court should not find that to be true which is not true, and when uncontradicted sworn testimony is offered upon matters material for the court to know, the writer of this brief believes the court should hear it. If the court was mistaken in holding as it did in *Pigeon* v. *Buck*, that the case of *Shulthis* v. *McDougal* had become a rule of property, it should have heard evidence and corrected the mistake. That the Supreme Court of Oklahoma was mistaken will not be doubted by anyone who will read the excluded evidence. While no case exactly like this has been found, the discussion in Sections 849 and 850 of Chamberlayne on Evidence as to the means by which a court can inform itself, may assist the court in arriving at a conclusion upon this point. The evidence, as it appears in the record, is now offered to this court for its information in arriving at a conclusion as to whether or not the rule in *Shulthis* v. *McDougal* has become a rule of property.

Specification V.

The Supreme Court of Oklahoma erred in holding that the decision in *Shulthis* v. *McDougal* had become a rule of property.

If it was the duty of the Supreme Court to hear evidence on this question, there can be no doubt that the fifth specification of error should be sustained. The evidence shows that ninety-five per cent of the sales made prior to the decision in which this question could arise were made on the theory that the allotment was a new acquisition. If this court can consider the evidence that was excluded there can be only one result. But the plaintiff in error insists that the court erred in so holding, even though his evidence bearing upon the question was properly excluded.

In the opinion in this case the Supreme Court of Oklahoma concedes that prior to the decision in *Shulthis* v. *McDougal* a large per cent of the lawyers in Eastern Oklahoma considered allotments new acquisitions. The court said:

> "While we are aware of the fact that a large per cent of the lawyers on the eastern side of this state were of the opinion that the titles to land similar to the title in question were a new acquisition, etc."

Taking that statement for a foundation, let us follow up the subject and see what has been done with the question in the courts and among the bar.

That opinion was rendered June 3, 1909, and the case was appealed to this court. The opinion was criticised by the Central Law Journal (Vol. 69, p. 217) some three months after it was rendered. It was also criticised in the Oklahoma State Bar Association (Report of Oklahoma Bar Association 1909) in a paper read by a member, who, at least on account of his official position if nothing else, was respected by the bar of the state. It was also referred to in section 62 of Bledsoe's Indian Land Laws and it was said there that the question would not be regarded as settled until passed upon by this court. The appeal was dismissed by this court June 7, 1912, because the federal question was not properly presented in the original bill or declaration (225 U. S. 561, 56 L. ed. 1205). It was less than one year from that time until on the 23rd day of April, 1913, the Supreme Court of Oklahoma decided the case of *Pigeon* v. *Buck*. The suit in *Pigeon* v. *Buck* was instituted September 13, 1910, long before the appeal in *Shulthis* v. *McDougal* was dismissed by this court, and must have been filed in the Supreme Court of Oklahoma eighteen months before it was decided and several months before this court dismissed the appeal in *Shulthis* v. *MDcougal*. The case of *Roberts* v. *Underwood*, 3 Okla. 376, 132 Pac. 673, which is now in this court on appeal, must have been brought about the same time. The attorneys bringing these suits did not believe the case of *Shulthis* v. *McDougal* would become the settled law.

So far as the decision in *Shulthis* v. *McDougal* is heard of it is being criticised or appealed from. The plaintiff in error offered evidence to the effect that several trial judges refused to follow it. The writer may be going too far in referring to this offered evidence. If it is proper to refer to it, then it is proper to say that no case was ever appealed from any court that declined to follow the *Shulthis* rule. In the case of *Barnes* v. *Keys*, 36 Okla. 6, 127 Pac. 261, decided October 23, 1912, the facts were similar to this case, but, though the lawyers in the case were among the leaders in the eastern part of the state, none of them took the position that the father of the allottee owned more than a life estate and the property was divided on that theory. The facts with reference to the relationship do not appear in the opinion, but it is believed not improper to state them here for the benefit of the court when it comes to consider the question of whether *Shulthis* v. *McDougal* became a rule of property.

Rule of Property Can Be Created Only by Court of Last Resort.

It is laid down in notes to 11 Cyc 756, that a rule of property can only be established by the decision of a court of last resort. The following from the case of *The Ocean Beach Association* v. *Brinley*, 34 N. J. Eq. 438, 448, lays down a rule that seems to govern many courts. In that case the court uses the following language:

"But the complainants insist that if the practice cannot have effect as a custom, it should nevertheless be held effectual to bar the defendant's claim in virtue of the maxim *communis error facit jus.* This, though an admitted legal maxim, is seldom applied in the administration of justice, and never without the utmost caution. The reason is obvious, it permits misconception to become law in destruction of the real law of the case. In my judgment, no error should be allowed to possess that degree of dignity and force until it has been sanctioned by a tribunal of superior jurisdiction, and subsequently treated as law in the actual business affairs of men. The rule I believe to be this: That no error is entitled to be accepted as law by the courts, until it has been declared to be law by a competent judicial decision, and afterwards so far adopted in practice that a return to the true law would seriously impair existing interests.

"In *O'Connell* v. *Queen,* 11 Cl. & Fin. 373, Lord DENMAN said:

> 'And when in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—a mere repetition of the cantilena of lawyers—cannot make it law if it be irreconcilable with some clear legal principle.'

"And Lord BROUGHAM, in *DeVaynes* v. *Noble,* 2 Russ. & Myl. 506, said:

> 'Common or universal error may be said to make the law, especially if the opinion of lawyers and the decisions of judges have been ruled by it.'

"Justice BLACKBURN says, in *Jones* v. *Tapling*, 12 C. B. (N. S.) 846:

> 'There are cases in which a decision originally erroneous, has been so long acquiesced in and acted on, that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. In such cases the maxim *communis error facit jus* may be applied.'

"The error approved in *Morecock* v. *Dickins*, Amb. 678, was one that had been sanctioned by a prior adjudication. So, too, in *D'Arcy* v. *Blake*, 2 Sch. & Lef. 387, the error approved by Lord REDESDALE was one which prior decisions had made law. He said:

> 'The decisions to the full extent are so old, so strong, and so numerous, so adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt, at this time, to alter them.'"

"In my opinion, there is no evidence whatever, in this case, that the error which the complainants insist shall have the force of law, has ever been recognized or applied by any authority competent to give it the force of law."

It has been held that decisions of Circuit Courts could not establish a rule of property that would be binding on the Circuit Court of Appeals. (*American Mortgage Co.* v. *Hopper*, 64 Fed. 553; *The Madrid*, 40 Fed. 677). If this doctrine is correct then the Circuit Court of Appeals cannot by one decision create a rule of property binding on this court, and

certainly the Supreme Court of Oklahoma cannot do so in a case that is immediately appealed here.

On these Indian questions it is only when this court has passed on the question that the public feel that it is settled. The situation could not be stated better than it was stated by Mr. C. L. Thomas (since dead) at that time representing the defendants in error, in the first question he asked Mr. N. A. Gibson, whose deposition was being taken by the plaintiff in error, and Mr. Gibson's answer thereto. (Rec., p. 68.) His question was, "The fact is that every lawyer and practically every man engaged in the buying and selling of Indian land is more or less skeptical about every decision until it has been passed on by the Supreme Court of the United States?" To which Mr. Gibson answered, "Yes, sir."

In the case of *Gannon* v. *Johnston*, 40 Okla. 695, 140 Pac. 430, it was held that the doctrine of Rule of Property could not be applied to make a valid conveyance of restricted land. The rule there laid down may not be applicable to this case because it may be that no governmental policy is involved in the present case, but it is referred to for the consideration of the court.

To Establish Rule of Property the Doctrine Must Be Acquiesced In.

The writer believes that one of the principal elements of the doctrine of Rule of Property is that

it has been acquiesced in. This court can see from the numerous appeals that come to it, if in no other way, that the case of *Shulthis* v. *McDougal* has never been acquiesced in. The bar has not believed it to be the law. The court in passing on this question has the right to consider publications referring to the case. In section 62 of the first edition of Bledsoe's Land Laws it is said that it had been the practically unanimous opinion of lawyers in Eastern Oklahoma that an estate such as is involved here was a new acquisition. The same statement was made in a paper read before the Oklahoma State Bar Association. (Report Oklahoma Bar Association, 1909, p. 161.) In a brief by Mr. Preston C. West, now Assistant Attorney General of the United States, and Mr. George S. Ramsey, who is one of the counsel for defendants in error in this case, filed in this court in the appeal of *Shulthis* v. *McDougal*, No. 156, October Term, 1911, they say (p. 70):

> "With these holdings * * * it is little wonder that the bar and bench in the Indian Territory were practically unanimous in holding that the allotment of a citizen of the tribe was a new acquisition in such allottee and not ancestral."

If it is the law that a rule of property can be established by general concensus of opinion without the decision of a court of last resort then there was a rule of property to the effect that the allotments were new acquisitions which existed prior to the decision in *Shulthis* v. *McDougal* and the defendants in error are IN A DILEMMA.

If it takes a decision of a court of last resort to establish the rule they fail on this point because this court has never passed on the question. If the doctrine can be established by general acquiescence, it had been established contrary to the doctrine of *Shulthis* v. *McDougal* before that decision was rendered.

Justice Requires Reversal of the Rule in *Shulthis* v. *McDougal.*

If it be true that most of the lands similarly situated have been sold on the theory that the allotments were new acquisitions, justice demands that this case be reversed. The theory of the Supreme Court of Oklahoma that if only a small number of titles have been acquired in reliance upon the doctrine of *Shulthis* v. *McDougal,* it should stand, cannot influence this court, if many more titles have been acquired on the theory that allotments were new acquisitions.

In *Mason* v. *Nelson,* 148 N. C. 492, 62 S. E. 625, 18 L. R. A. (N. S.) 1221, the court said:

> "We are not insensible to the great importance of the doctrine of *stare decisis*—a doctrine of recognized value in all countries whose jurisprudence, like our own, is founded so largely on precedents. We know that the courts in such countries, as a general rule, will adhere to a decision found to be erroneous, when it has been acquiesced in for a great length of time so

as to become accepted law constituting a rule of property. And there are other conditions, restricted in their nature, where the doctrine may be properly applied, but none of them require or permit that a court should adhere to a decision found to be clearly erroneous, which affects injuriously a general business law; and under the circumstances indicated here. As it has been well said, 'Where vital and important public or private rights are concerned, and the decisions regarding them are to have a direct and permanent influence on all future time, it becomes the duty, as well as the right of the court to consider carefully and to allow no previous error to continue if it can be corrected. The foundation of the rule of *stare decisis* was promulgated on the ground of public policy, and it would be *an egregious mistake to allow more harm than good to accrue from it.*' 26 Am. & Eng. Enc. Law, 2 ed. p. 184. This decision, announced something like ten years ago, cited not more than twice as direct authority for the proposition it contains, and disapproved in the state where it seems to have originated, commented on adversely by the intelligent annotators and reviewers of the country, and pronounced unsound by the great weight of authority bearing on the question, cannot be considered to have ever been acquiesced in, or to have become the accepted law of the land. Nor are we inadvertent to the fact that this contract was made at a time when *Finch* v. *Gregg* expressed the rule which prevailed with us on the question presented; but we are of the opinion that this should not be allowed to affect the result." (Italics by the writer.)

The allotment of most of the Creek lands was completed by 1906. Statehood came in 1907 and it has been generally supposed that the Oklahoma law governs in cases where the descent has been cast since statehood. (Though that view is challenged and the question will be before this court before long.) Purchasers had from the time allotments were made until 1909 to buy allotments such as the one in controversy. This court cannot but be aware of the activity of purchasers of Indian lands. From the public history of the Indian country this court will know that if allotments such as this were considered new acquisitions, most of them had been bought and sold on that theory before the decisions in *Shulthis* v. *McDougal,* and that comparatively few could have been purchased since. Those who sold believing they had a life estate, only obtained a consideration in proportion. It does not seem fair to confirm such conveyances into fee simple titles when the consideration was not paid on that theory. The facts are that the construction placed on this question by the bench and bar prior to the *Shulthis* case, had almost become a technical rule of property, and this appeal and the other appeals on the same question to this court are to prevent that rule from being overturned by the decision in *Shulthis* v. *McDougal.*

Resume.

It is the position of the plaintiff in error that the Statute of Descent and Distributions as contained in chapter 49 of Mansfield's Digest of the Statutes of Arkansas had the same meaning in the Indian Territory as it did in Arkansas.

That the estate of Andrew J. Berryhill in his allotment was a new acquisition.

That the evidence offered to show that the decision in *Shulthis* v. *McDougal* never became a rule of property should have been considered by the courts of Oklahoma and should be considered by this court.

That the doctrine of *Shulthis* v. *McDougal* never became a rule of property.

Wherefore, plaintiff in error insists this case should be reversed.

Respectfully submitted,

MALCOLM E. ROSSER,
Counsel for Plaintiff in Error.

WILLIAM S. COCHRAN,
Of Counsel.

(24,420)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 676.

DANIEL A. McDOUGAL, PLAINTIFF IN ERROR,

vs.

EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, AND ALBERT W. SHULTHIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

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1 In the Supreme Court of the United States.

DANIEL A. McDOUGAL, Plaintiff in Error,

vs.

EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants in Error.

On Writ of Error to the Supreme Court of the State of Oklahoma.

2 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Oklahoma, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Oklahoma, in the City of Oklahoma City, this October 20, 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

3 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Greeting:

You and each of you are hereby admonished to be and appear at the Supreme Court of the United States, at the City of Washington in the District of Columbia, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of said Supreme Court of the United States wherein Daniel A. McDougal is Plaintiff in Error and you are Defendants in Error, to show cause if any there be, why the said judgment in said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States of America this 5 day of October, A. D. 1914, and of the Independence of the United States the one hundred and thirty ninth.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest:
W. H. L. CAMPBELL,
Clerk of the Supreme Court of the State of Oklahoma,
By JESSIE PARDOE, *Deputy.*

[Seal Supreme Court, State of Oklahoma.]

Service of the above citation is hereby accepted on behalf of the defendants in error on this the 12th day of October, A. D. 1914.

GEORGE S. RAMSEY,
EDGAR A. DE MENLES,
Attorneys for Defendants in Error.

Filed Oct. 20, 1914. W. H. L. Campbell, Clerk.

4 Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6372.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Petition for Writ of Error.

Comes now the above named, Daniel A. McDougal, plaintiff in error in the above styled cause, and respectfully shows that on the 25th day of August, A. D. 1914, the Honorable Supreme Court of the State of Oklahoma rendered a final judgment against this petitioner, the said Daniel A. McDougal, in a certain case wherein he, the said Daniel A. McDougal, was plaintiff in error and Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis were defendants in error, which judgment of the said Supreme Court of the State of Oklahoma affirmed the judgment of the District Court of Tulsa County and also ordered that the said plaintiff in error, Daniel A. McDougal, should pay all the costs of said case in the said Supreme Court, as will appear by reference to the record and proceedings of said suit; that said Supreme Court of the State of Oklahoma is the highest Court of said State in which a decision in said case could be had and that manifest error has occurred in the rendering of said judgment greatly to the damage of the said Daniel A. McDougal, this petitioner, whereby he feels aggrieved; that by the record and proceedings in said case it will appear that the said Daniel A. McDougal brought this action claiming to be the owner of the following described lands, to-wit:

The East Half (E/2) of the North-west Quarter (NW/4)
5 of the North-east Quarter (NE/4) and the South-west Quarter (SW/4) of the North-west Quarter (NW/4) of the North-east Quarter (NE/4) of Section Thirteen (13), Township Seventeen (17) North, Range Twelve (12) East, containing Thirty (30) acres, more or less, according to the United States survey thereof, subject to a life estate in the defendants Edmond McKay, Perry McKay and John V. McKay.

That the said Daniel A. McDougal claims and derives his title to the said lands as follows:

That on towit the 8th day of March, 1911, there was negotiated by and between the Commission to the Five Civilized Tribes, consisting at that time of Henry L. Dawes, Tams Bixby, Archibald S. McKennon and Thomas B. Needles and certain commissioners on behalf of the Muskogee or Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, George A. Alexander, David M. Hodge, Isparhecher, Albert P. McKellop and Cub McIntosh a certain agreement providing for a general allotment, in severalty, of the lands of said Muskogee or Creek Tribe of Indians, which said agreement or treaty was afterwards enacted into a law by the Congress of the United States, by an act of Congress entitled "An Act to Ratify and Confirm an Agreement with the Muskogee or Creek Tribe of Indians, and for other purposes," approved March 1, 1901, and ratified by the Creek National Council May 25, 1901; and by Section three of said act it was provided that all lands of said tribe except as therein provided should be allowed among the citizens of the tribe, by said Commissioner, so as to give each an equal share of the whole, in value, as nearly as may be, in the manner in said act provided; which said act appears in 31 United States Statutes at Large 861. That thereafter a certain agreement supplemental to said last recited agreement and act of Congress, was negotiated between the Commission to the Five Civilized Tribes consisting of Henry L. Dawes Tams Bixby, Thomas B. Needles and Clifton R. Breckinridge, and certain commissioners of the Muskogee or Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, Roley McIntosh, Thomas W. Perryman, Amos McIntosh and David M. Hodge, which said supplemental agreement was enacted into law by Congress of the United States by an act entitled "An Act to Ratify and Confirm a Supplemental Agreement with the Creek Tribe of Indians, and for other purposes," approved June 30, 1902, and appears in 32 Statutes at Large 500, and by proclamation of the President as therein provided, became operative August 8, A. D. 1902; that by Section six of said last named act it was provided:

"The Provisions of the act of Congress approved March 1, 1901, (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in the Indian Territory; Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; And provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in Chapter 49."

6 And by Section Seven of said act it was further provided:

"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901,

(31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, then the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

That by Section Twenty of said act, it was further provided:

"This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement treaty, or law in conflict herewith."

That Chapter 49 of Mansfield's Digest, entitled "Descents and Distributions," as referred to in said act of Congress and as adopted and put in force in the Creek Nation of the Indian Territory and which thereby became a law of the United States, provides as follows:

"SECTION 2522. When any person shall die, having title to any real estate of inheritance, or personal estate (*b*), not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First: To children, or their descendants, in equal parts.

Second: If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third: If there be no children, nor their descendants, father, mother, brother or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

7 "SEC. 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his life time, and then descend in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time; then to descend to the collateral heirs as before provided (*d*)."

That in the month of May, A. D. 1901, there was born to one George Franklin Berryhill and Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill; that said George Franklin Berryhill is, and at all the times mentioned in the petition was, a Creek Indian and a citizen of the Creek Nation, duly enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood, and his name appears upon the rolls of said Commission as a mixed blood Indian and not a full-blood; that said Clemen-

tine Berryhill, wife and mother, is not and at no time has been a citizen of the Creek Nation; that said Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried, leaving no brothers or sisters surviving him; that thereafter and on or about the 8th day of October, A. D. 1902, the name of the said Andrew J. Berryhill was duly placed upon the tribal rolls of the Creek Nation as a citizen thereof, by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 14, 1902; that on the — day of ——, in the year 1904 the Commission to the Five Civilized Tribes set apart and allotted to said Andrew J. Berryhill, deceased, the lands described in this petition with other lands, and that on or about October 10, 1905 the United States of America together with the Creek Nation, did, through their legal representatives, execute a deed or patent to said lands, and the Principal Chief of the Creek Nation, P. Porter, on behalf of the Creek Nation did, on or about the 10th day of October, 1905, execute a deed or patent covering and describing said lands, which was subsequently approved by the Secretary of the Interior in behalf of the United States of America, confirming the title in and to said lands in the heirs of Andrew J. Berryhill, deceased, which said patent was afterwards and in the year 1905 filed with the Commission to the Five Civilized Tribes and recorded in the records in the office of the Commission to the Five Civilized Tribes, as required by law.

That on the 5th day of June, 1906 the said George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, executed and delivered to the defendants, Edmond McKay and Perry McKay, a warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond and Perry McKay all their right, title and interest in and to the lands in this petition hereinbefore described, which deed was duly filed for record in the Office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa; and that by said deed there was conveyed to the said Edmond and Perry McKay a life estate only and no more in and to the lands and premises hereinbefore described.

8 That thereafter and on to-wit the 9th day of August, A. D. 1910, the said Edmond and Perry McKay, joining with them their wives Florence and Gusta McKay, executed and delivered to John V. McKay a deed of conveyance of an undivided one-third interest in whatever right they had in the lands hereinbefore described, which this plaintiff in error avers was a life estate only, and no more, which said deed was filed for record and now appears of record in the office of the Register of Deeds in and for Tulsa County, Oklahoma, record in Record Book 128, at page 342, and a copy of which deed is attached hereto, marked Exhibit "B" and made a part of this petition; and that by said deed the defendant John V. McKay, became the owner of an undivided one-third interest in and to a life estate only in the lands hereinbefore described and no more.

That Andrew J. Berryhill, deceased, left surviving him the following uncles and aunts, Martha E. Lee Kiefer, Stanford Berryhill,

Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, and that said uncles and aunts inherited the fee in the land hereinbefore described, subject to a life estate in the father, George Franklin Berryhill, under the provisions of said Chapter 49 of Mansfield's Digest of the Laws of Arkansas put in force as heretofore alleged and as hereinbefore set out; and that no person or persons other than said uncles and aunts inherited any right, title or interest in or to said lands, and that the only person other than said uncles and aunts who inherited any right or interest therein was the said George Franklin Berryhill, the father of Andrew J. Berryhill, who inherited a life estate therein, and no more.

That subsequent to August 8, 1907, the plaintiff, Daniel A. McDougal, purchased from all of said uncles and aunts all their right, title and interest in and to the lands in controversy, for a valuable consideration, and said uncles and aunts executed and delivered to said Daniel A. McDougal warranty deeds for said land, conveying to and vesting in the said Daniel A. McDougal the fee in and to the said lands with other lands, subject only to the life estate of the father, George Franklin Berryhill, at that time owned by the defendants, Edmond McKay and Perry McKay, the said deeds of conveyance being as follows; to-wit:

Deed from Martha E. Lee Kiefer to Daniel A. McDougal, dated August 20, 1907, the husband of said Martha E. Lee Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the recording District in which said land is situated.

Deed from Stanford Berryhill to Daniel A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated.

Deed from Columbus Berryhill to Daniel A. McDougal, dated August 21, 1907, wherein and whereby he conveyed all his right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated.

9 Deed from Theodore Berryhill to Daniel A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto and marked Exhibit "F" and made a part of this petition.

Deed from William Berryhill to Daniel A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right,

title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto and marked Exhibit "G" and made a part of this petition.

Deed from Mary Kiefer to D. A. McDougal, dated August 16, 1907, the husband of said Mary Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the recording district in which said land is situated, and a copy of which deed is attached hereto and marked Exhibit "H" and made a part of this petition.

Deed from Josie Morton to Daniel A. McDougal, dated August 20, 1907, the husband of said Josie Morton joining therein, wherein and whereby she conveyed all her right, title and interest in said land to Daniel A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the recording district in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "I" and made a part of this petition.

That there was drawn in question the construction of the laws and treaties of the United States and the effect of the act of Congress and treaties between the United States of America and the Creek Nation or Tribe of Indians, as hereinbefore set out, and of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas put in force in the Indian Territory; that it was claimed and contended by the said Daniel A. McDougal, this petitioner, that said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas put in force in the Indian Territory by the Acts of Congress above set forth, became, and was, a law of the United Stated of America; and that it was put in force in the Indian Territory subject to the construction which had theretofore been placed thereupon by the Supreme Court of the State of Arkansas, and that under the said Chapter 49 of the Statutes of Arkansas, and especially under Section 2531 of said Chapter 49, the land above described, which was the allotment of Andrew J. Berryhill, as appears from the record and proceedings, came to him as a new acquisition and not as an ancestral estate; and that upon the death of the said Andrew J. Berryhill without issue, that his father, George Franklin Berryhill, and his mother, Clementine Berryhill, inherited only a life estate in said lands, and that the fee simple to said lands descended to the collateral kindred of the said Andrew J. Berryhill, all of whom have deeded their interest in said lands to this petitioner, Daniel A. McDougal, and that this petitioner was, and is, the owner of the fee simple in said lands, subject to the life estate in the said Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis. That the decision of the Honorable Supreme Court of the

State of Oklahoma was against the contention of this petitioner and against his title claimed under said section 2531 of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, and said decision was to the effect that the allotment of the said Andrew J. Berryhill was an ancestral estate and that his parents inherited the entire fee simple in said lands and that the grantors of this petitioner inherited no right, title or interest therein; all of which is fully apparent in the record and proceedings of the case and is specifically set out in the assignment of errors filed herewith.

Whereupon, petitioner prays that his appeal be allowed and that a transcript of record, proceedings and papers upon which said orders were made, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, District of Columbia, under the rules of said court in such cases made and provided, in order that the same may be inspected and corrected, as ac-
11 cording to law and justice should be done.

MALCOLM E. ROSSER,
WILLIAM S. COCHRAN,
Attorney- for Plaintiff in Error.

Writ of Error allowed this 8 day of Sept. 1914.

[Seal Supreme Court, State of Oklahoma.]

M. J. KANE,
Chief Justice.

Attest:
W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

12 Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the United States.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Assignment of Errors.

Comes now Daniel A. McDougal, plaintiff in error in the above styled cause and for his assignment of errors alleges and states that the Supreme Court of the State of Oklahoma erred to the grievous injury and prejudice of plaintiff in error, in the following particulars, to-wit:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Tulsa County.

2. The Supreme Court of the State of Oklahoma erred in holding and deciding that under Mansfield's Digest of the Laws of Arkansas,

and particularly chapter forty nine thereof, the allotment of Andrew J. Berryhill was an ancestral estate and not a new acquisition.

3. The Supreme Court of the State of Oklahoma erred in holding and deciding that the father of Andrew J. Berryhill, deceased inherited the fee simple in the lands of said Andrew J. Berryhill deceased upon his death to the exclusion of the collateral kindred of the said Andrew J. Berryhill.

4. The Supreme Court of the State of Oklahoma erred in holding and deciding that the various grantors of the plaintiff in error who were the uncles and aunts of the said Andrew J. Berryhill deceased, did not inherit the fee simple estate in his allotment upon his death and that plaintiff in error acquired no interest in said lands
13 under and by virtue of his deeds from them.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of lawyers to the effect that the decision of the Circuit Court of Appeals in the case of Shulthis vs. McDougal, 170 Fed. 529, had not been followed or acquiesced in by the bar of the State nor by the nisi prius judges, was not admissible in evidence.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that the decisions in the case of Shulthis vs. McDougal, 170 Fed. 529 and Pigeon vs. Buck, 38 Oklahoma 101 had become a rule of property.

Wherefore for these and other manifest errors appearing on the record in said cause, this petitioner prays that the judgment of the Supreme Court be reversed and that judgment be rendered for this petitioner, establishing his right to the fee simple in lands in said action described together with the rents and royalties in the gas and oil taken therefrom, and for all his costs.

MALCOLM E. ROSSER,
WILLIAM S. COCHRAN,
Attorneys for Plaintiff in Error.

14 (Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the United States.

No. —.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Now on this 8 day of September, A. D. 1914, came on to be heard the application of Daniel A. McDougal, plaintiff in error, said plaintiff being represented by counsel, for a writ of error, in the above styled cause; and it appearing to the court from the petition filed herein and the records filed therewith that the application ought to be granted and that the transcript of record and proceedings and

papers upon which the judgment of the court was rendered, properly certified, should be sent to the Supreme Court of the United States, as prayed for in the petition in order that such proceedings may be had as will be just in the premises.

It is therefore ordered that the writ of error be allowed upon the plaintiff in error giving bond, as the laws directs, in the sum of Five Hundred & No/100 Dollars, and that a true copy of the record, assignment of errors and all the proceedings had in the case in the Supreme Court of the State of Oklahoma shall be transmitted to the Supreme Court of the United States properly certified, as the law directs, that that court may inspect same and do what according to law should be done.

It is further ordered that a citation issue citing and directing the defendants in error in said case to appear in the Supreme Court of the United States to answer said writ *or* error and assignment of error according to law.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Attest.
[SEAL.] W. H. L. CAMPBELL, *Clerk,*
By JESSIE PARDOE, *Deputy.*

Endorsed: No. —. In the Supreme Court of the United States. Daniel A. McDougal, Plaintiff in Error vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error. Order Granting Writ of Error. Rosser & Cochran, Attorneys for Plaintiff in Error.

15 Filed Oct. 5, 1914. W. H. L. Campbell, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Supreme Court of the State of Oklahoma, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Oklahoma, before you at the July term A. D. 1914, thereof, being the highest Court of law or equity of the said State in which a decision could be had in said suit, between Daniel A. McDougal, Plaintiff and Plaintiff in Error, and Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants and Defendants in Error, wherein was drawn in question the construction of a statute of the United States, and the decision was against the right, title, privilege or exemption set up or claimed under such statute, a manifest error has happened, to the great damage of the said Daniel A. McDougal, plaintiff in error as by his complaint appears.

We being willing that error if any hath beeen, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that

then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same to the Supreme Court of the United States, together with this writ so that you may have them at Washington on the 2nd day of November next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 3rd day of October, A. D. 1914.

[Seal of the United States District Court, Esatern District of Oklahoma.]

R. P. HARRISON,
Clerk U. S. Dist. Court, East. Dist. of Okla.,
By L. S. TRIMBLE, *Deputy.*

Allowed this 5 day Oct., 1914.

M. J. KANE,
Chief Justice Sup. C't Oklahoma.

16 In the Supreme Court of the United States.

No. —.

DANIEL A. MCDOUGAL, Plaintiff in Error,
vs.
EDMOND MCKAY, PERRY MCKAY, JOHN V. MCKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Know all men by these presents: That we, Daniel A. McDougal, Frank P. Smith and R. B. Thompson are held and firmly bound unto Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis in the just and full sum of Two Thousand Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

Witness our hands and seals this 10 day of September, A. D. 1914.

Whereas, lately at the July term A. D. 1914, of the Supreme Court of the State of Oklahoma, in a suit pending in said Court between Daniel A. McDougal, plaintiff in error, and Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, defendants in error, judgment was rendered against the said plaintiff in error; and the said plaintiff in error has obtained a writ of error of the said Court to reverse said judgment, and a citation directed to the said Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden

at Washington in the District of Columbia not exceeding thirty days from and after the date of the citation in this cause.

Now, the condition of the foregoing obligation is such that if the said plaintiff in error shall prosecute said writ to effect and answer all costs if he fails to make his plea good, then the above
17 obligation to be void; otherwise to be and remain in full force and effect.

DANIEL A. McDOUGAL. [SEAL.]
FRANK P. SMITH. [SEAL.]
R. B. THOMPSON. [SEAL.]

STATE OF OKLAHOMA,
Muskogee County, ss:

Daniel A. McDougal, Frank P. Smith and R. B. Thompson whose names are subscribed to the foregoing bond as obligors, being severally and duly sworn each for himself says: That he is a resident and freeholder of the State of Oklahoma and that he is worth the sum of Three Thousand Dollars above all his just debts and liabilities, in property not exempt by law from execution.

DANIEL A. McDOUGAL.
FRANK P. SMITH.
R. B. THOMPSON.

Subscribed and sworn to before me this 10 day of September A. D. 1914.

[SEAL.] GEORGIA ROUNDS,
Notary Public.

My Commission expires May 18, 1918.

The foregoing bond is approved this 12 day of September A. D. 1914.

M. J. KANE,
Chief Justice of the Supreme Court of the State of Oklahoma.

Endorsed: No. 6372. In the Supreme Court of the United States. Daniel A. McDougal, Plaintiff in Error vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error. Bond. Received Sep. 12, 1914. W. H. L. Campbell, Clerk. Rosser & Cochran, Attorneys for Plaintiff in Error.

18 Filed May 5, 1914. W. H. L. Campbell, Clerk.

In the Supreme Court of the State of Oklahoma.

No. 6372.

D. A. McDougal, Plaintiff in Error,
vs.
Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error.

Petition in Error.

The said D. A. McDougal, Plaintiff in Error, complains of the said Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error, for that the said defendants in Error, on the 10th day of March, A. D. 1914, at the March term of the District Court of Tulsa County, State of Oklahoma, recovered a judgment by the consideration of said court, against the said D. A. McDougal in a certain action then pending in the said court wherein the said D. A. McDougal was plaintiff and the said Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis were defendants. The original case made in said case, duly certified and attested, is hereunto attached, and marked "Exhibit A" and made a part of this petition in error; and the said D. A. McDougal alleges that there is error in the said record and proceedings in this, to-wit:

I.

The Court erred in excluding the deposition of N. A. Gibson, taken on the 5th day of March, A. D. 1914 and offered in evidence at the trial in this case.

II.

The Court erred in excluding the deposition of Mr. J. C. Stone, taken on the 5th day of March, A. D. 1914, and offered in
19 evidence at the trial in this case.

III.

The court erred in excluding the deposition of Mr. Guy L. Andrews offered in evidence at the trial in this case.

IV.

The court erred in excluding the deposition of Gene P. Day offered in evidence at the trial in this case.

V.

The court erred in excluding the testimony of Mr. Gray Carroll offered at the trial of the case.

VI.

The court erred in excluding the testimony of Messrs. C. S. Walker, D. B. Hughes, A. J. Biddison, Harry Campbell, Frank P. Smith, J. F. Lawrence and L. O. Lytle.

VII.

The court erred in excluding the exhibits to the deposition of Mr. N. A. Gibson offered in evidence at the trial.

VIII.

The court erred in excluding the evidence offered by the plaintiff to the effect that some of the District Judges and some of the County Judges of the State had refused to follow the decision of the Circuit Court of Appeals in the case of Shulthis vs. McDougal reported in 170 Fed. Reporter 529.

IX.

The court erred in rendering judgment for the defendants.

X.

The court erred in holding that the allotment of the deceased allottee, Andrew J. Berryhill, was an ancestral estate and not a new acquisition.

20 XI.

The court erred in holding that the fee simple estate in the land in controversy was inherited by George Franklin Berryhill and Clementine Berryhill, father and mother respectively of Andrew J. Berryhill, deceased; and erred in refusing to hold that they only inherited a life estate in the land.

XII.

The court erred in over-ruling the motion of the plaintiff in error for a new trial.

Wherefore, the plaintiff in error prays that said judgment so rendered may be set aside and held for naught and that a judgment may be rendered in favor of the plaintiff in error and against the defendants in error upon the pleadings and agreed statement of facts appearing in the record of this case, and for all proper relief.

D. A. McDOUGAL,
Plaintiff in Error,
By ROSSER & COCHRAN,
His Attorneys.

21 [Endorsement:] No. —. In the Supreme Court of the State of Oklahoma. D. A. McDougal, Plaintiff in Error, vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Schulthis, Defendants in Error. Petition in Error. Ros-
22 & 23 ser and Cochran, Attorneys for Plaintiff in Error. District Court, State of Oklahoma, County of Tulsa. Filed April 8th, 1914. W. W. Stuckey, Clerk. Filed May 5-1914. W. H. L. Campbell, Clerk.

24 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Schulthis, Defendants.

Case-Made.

Be it remembered, That the plaintiff, D. A. McDougal, commenced his action against the defendants Edmond McKay, Perry McKay, John V. McKay and Albert W. Schulthis by filing his petition against said Defendants in the district court within and for the County of Tulsa, State of Oklahoma, on the 5th day of April, 1913, which said petition is in the words and figures following, to-wit:

25 No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert Schulthis, Defendants.

Petition.

Comes the plaintiff, D. A. McDougal, and for his cause of action against the defendants Edmond McKay, Perry McKay, John V. McKay, and Albert W. Schulthis, states and shows to the court:

I.

That D. A. McDougal is a citizen and resident of the State of Oklahoma; that the defendants Edmond McKay and Perry McKay are also citizens and residents of the State of Oklahoma; that the defendant John V. McKay is a citizen and resident of the state of Missouri; and that the defendant Albert W. Schulthis is a citizen and resident of the State of Kansas; and that the lands hereinafter described are situated within the County of Tulsa, in said State of Oklahoma.

II.

That the plaintiff D. A. McDougal is the owner of the fee to the following described real estate situated in the County of Tulsa and State of Oklahoma, to-wit:

26 The East Half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13), Township Seventeen (17), North, Range Twelve (12), East, containing, Thirty (30) acres more or less according to the United States Survey thereof, subject only to a life estate in the defendants Edmond McKay, Perry McKay and John V. McKay as hereinafter more particularly set forth.

III.

That the lands hereinbefore described are within proven oil and gas producing territory, and that both oil and gas are now being produced therefrom as hereinafter more particularly set out.

IV.

That the lands and premises hereinbefore mentioned and described are now in the possession of the defendants Edmond McKay, Perry McKay and John V. McKay, and the defendant Albert W. Schulthis has entered thereon and had drilled wells thereon for the production of oil and gas, and is proceeding to drill other wells thereon for the production of oil and gas or oil or gas, and that said development by the defendant Schulthis has been done and is being done, as plaintiff is informed and believes, by, under and with the consent of the defendants Edmond McKay, Perry McKay and John V. McKay.

V.

That plaintiff derives his title to the said lands as follows:

That on, to-wit: the 8th day of March, 1900 there was negotiated by and between the Commission to the Five Civilized Tribes consisting at that time, of Henry L. Dawes, Tams Bixby, Archibald S. McKennon and Thomas B. Needles, and certain commissioners on behalf of the Muskogee or Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, George A. Alexander, David M.

27 Hodge, Isparhecher, Albert P. McKellop, and Cub McIntosh, a certain agreement providing for a general allotment, in severalty, of the lands of said Muskogee or Creek Tribe of Indians, which said agreement or treaty was afterwards enacted into a law by the Congress of the United States, by an act of Congress entitled "An Act to Ratify and Confirm an Agrr-ment with the Muskogee or Creek Tribe of Indians, and for other purposes" approved March 1, 1901, and ratified by the Creek National Council May 25, 1901; and by Section three of said act it was provided that all lands of said tribe except as therein provided, should be allotted among the citizens of the tribe, by said Commission, so as to give each an equal share of the whole, in value, as nearly as may be, in manner in said

act provided; which said act appears in 31 United States Statutes at Large, 861. That thereafter a certain agreement supplemental to said last recited agreement and act of Congress, was Negotiated between the Commission to the Five Civilized Tribes consisting of Henry L. Dawes, Tams Bixby, Thomas B. Needles and Clifton R. Breckenridge, and certain commissioners of the Muskogee of Creek Tribe of Indians in Indian Territory, to-wit: Pleasant Porter, Roley McIntosh, Thomas W. Perryman, Amos McIntosh, and David M. Hodge, which said supplemental agreement was enacted into law by the Congress of the United States by an act entitled "An act to Ratify and Confirm a Supplemental agreement with the Creek Tribe of Indians and for other purposes" approved June 20, 1902, and appears in 32 Statutes at Large, 500, and by proclamation of the President as therein provided, became operative August 8, A. D. 1902; that by Section six of said last named act it was provided:

28 "The provisions of the act of Congress, approved March 1, 1901 (31 Stat. L. 861) insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and provided further, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said chapter 49".

And by Section Seven of said act it was further provided:

"All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

That by Section Twenty of said act, it was further provided:

"This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement, or in any prior agreement, treaty or law in conflict therewith."

That Chapter 49 of Mansfield's Digest, entitled Descents and Distributions, as referred to in said act of Congress and as adopted and put in force in the Creek Nation of the Indian Territory and which thereby became a law of the United States, provided as follows:

"SECTION 2522. When any person shall die, having title to any real estate of inheritance, or personal estate (*b*), not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary, to his

kindred, male and female, subject to the payment of his debts and the widow's dower in the following manner:

First: To children or their descendants, in equal parts.

Second: If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

29 Third: If there be no children or their descendants, father, mother, brothers or sisters, not their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants in equal parts.

* * * * * * *

"SEC. 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided. *(d)*"

That in the month of May, A. D., 1901, there was born to one George Franklin Berryhill and Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill; that said George Franklin Berryhill is, and at all the times mentioned in the petition was, a Creek Indian and a citizen of the Creek Nation, duly enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood, and his name appears upon the rolls of said Commission as a mixed blood Indian and not a full blood; that said Clementine Berryhill, wife and mother, is not and at no time has been a citizen of the Creek Nation; that said Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried, leaving no brothers or sisters surviving him, that thereafter and on or about the 8th day of October, A. D., 1902 the name of said Andrew J. Berryhill was duly placed upon the tribal rolls of the Creek Nation as a citizen thereof by the Commission to the Five Civilized Tribes, and this enrollment as such citizen was approved by the Secretary of the Interior on November 14, 1902; that on the — day of —— in the year 1904 the Commission to the Five Civilized Tribes set apart and allotted to said Andrew J. Berryhill deceased, the lands described in this petition with other lands, and that on or

30 about October 10, 1905 the United States of America together with the Creek Nation, did through their legal representatives, execute a deed or patent to said lands, and the Principal Chief of the Creek Nation, P. Porter, on behalf of the Creek Nation, did, on or about October 10, 1905, execute deed or patent covering and describing said lands, which was subsequently approved by the Secretary of the Interior in behalf of the United States of America, confirming the title in and to said lands in the heirs of Andrew J. Berryhill deceased, which said patent was afterwards and in the year 1905

filed with the Commission to the Five Civilized Tribes and recorded in the records in the office of the Commission to the Five Civilized Tribes as required by law.

That on the 5th day of June, 1906, the said George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, executed and delivered to the defendants Edmond McKay and Perry McKay, a warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond and Perry McKay all their right, title and interest in and to the lands in this petition hereinbefore described, which deed was duly filed for record in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, and a copy of which deed is hereto attached and marked Exhibit "A" and made a part of this petition; and that by said deed there was conveyed to the said Edmond and Perry McKay a life estate only and no more in and to the lands and premises hereinbefore described.

That thereafter and on to-wit, the 9th day of August, A. D. 1910, the said Edmond and Perry McKay, joining with them their
31 wives Florence McKay and Gusta McKay, executed and delivered to John V. McKay a deed of conveyance of an undivided one-third interest in whatever right they had in the lands hereinbefore described, which the plaintiff avers was a life estate only and no more, which said deed was filed for record and now appears of record in the office of the Register of Deeds in and for Tulsa County, Oklahoma, in Record Book 128 at page 342, and a copy of which deed is attached hereto, marked Exhibit "B" and made a part of this petition; and that by said deed the defendant John V. McKay became the owner of an undivided one-third interest in and to a life estate only in the lands hereinbefore described and no more.

That Andrew J. Berryhill deceased left surviving him the following uncles and aunts, Martha E. Lee Kiefer, Stanford Berryhill, Comumbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton; and that said uncles and aunts inherited the fee in the land hereinbefore described, subject only to a life estate in the father George Franklin Berryhill, under the provisions of said Chapter 49 of Mansfield's Digest of the laws of Arkansas put in force as heretofore alleged and as hereinbefore set out; and that no person or persons other than said uncles and aunts inherited any right, title or interest in or to said lands, and that the only person other than said uncles and aunts who inherited any right or interest therein was the said George Franklin Berryhill, the father of Andrew J. Berryhill, who inherited a life estate therein and no more.

That subsequent to August 8, 1907, the plaintiff D. A. McDougal purchased from all of said uncles and aunts all their right, title and interest in and to the lands in controversy, for a valuable con-
32 sideration and said uncles and aunts executed and delivered to said D. A. McDougal warranty deeds for said land, conveying to and vesting in the said D. A. McDougal the fee in and to the said lands with other lands, subject only to the life estate of the father George Franklin Berryhill, at that time owned by the defend-

ants Edmond and Perry McKay, the said deeds of conveyance being as follows: to-wit:

Deed from Martha E. Lee Kiefer to D. A. McDougal, dated August 20, 1907, the husband of said Martha E. Lee Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "C" and made a part of this petition.

Deed from Stanford Berrybill to D. A. McDougal, dated August 14, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "D" and made a part of this petition.

Deed from Columbus Berryhill to D. A. McDougal, dated August 21, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly
33 filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "E" and made a part of this petition.

Deed from Theodore Berryhill to D. A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "F" and made a part of this petition.

Deed from William Berryhill to D. A. McDougal, dated August 16, 1907, wherein and whereby he conveyed all his right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "G" and made a part of this petition.

Deed from Mary Kiefer to D. A. McDougal, Dated August 16, 1907 the husband of said Mary Kiefer joining therein, wherein and whereby she conveyed all her right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording
34 District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "H" and made a part of this petition.

Deed from Josie Morton to D. A. McDougal, dated August 20, 1907, the husband of said Josie Morton joining therein, wherein and whereby she conveyed all her right, title and interest in said land to D. A. McDougal, which deed was duly filed for record and recorded in the office of the Clerk of the United States Court and Ex-Officio Recorder at Sapulpa, Indian Territory, in the Recording District in which said land is situated, and a copy of which deed is attached hereto, marked Exhibit "I" and made a part of this petition.

And that by virtue of said several conveyances from the uncles and aunts of Andrew J. Berryhill deceased, the plaintiff D. A. McDougal became vested with and is now the owner of the fee title to the lands and premises hereinbefore mentioned and described, subject only to a life estate in the defendants Edmond McKay, Perry McKay and John V. McKay; and that no other person or persons has or have any right, title, interest or estate whatsoever in or to said lands or any part thereof, and that the oil and gas in and under said lands is owned by and is the property of the said D. A. McDougal and no other person or persons.

VI.

That the plaintiff D. A. McDougal is the owner of all the oil and gas in and under the lands hereinbefore mentioned and described and that he has never at any time executed or joined in any sale, conveyance or lease of the oil and gas in and under said lands, and that he has not by lease, conveyance, contract or otherwise, authorized any person or persons or corporation to prospect said lands for oil and gas or oil or gas or to drill any wells thereon for the production of oil and gas or oil or gas therefrom, and that the prospecting and drilling upon said lands as hereinafter set out and the production of oil and gas therefrom, is wholly without hes consent and without any authority, contract or agreement with or from him the said D. A. McDougal, and is in violation of his rights in said premises, and constitutes a continuing trespass thereon, and constitues wa-te and a diminution of his estate, and will, unless his rights are protected by appropriate orders of this Honorable Court, work him great and irreparable injury, and that he has no adequate remedy at law for the protection of his rights in the premises and unless granted relief by a court of equity, will be wholly remediless.

VII.

That the defendant Albert W. Shulthis has entered upon the lands and premises hereinbefore mentioned and described, without any right or authority from the plaintiff D. A. McDougal and without any right or authority whatsoever, and has proceeded to drill thereon one well which is producing oil, and from which the said Albert W. Shulthis is now and has for some time past been producing oil in large quantities and of great value, but the precise amount and

value thereof the plaintiff is unable to state, and has also drilled a certain other well upon said premises which is producing gas and from which the said defendant Albert W. Shulthis has produced and is now producing large quantities of gas of great value but the precise amount and value thereof this plaintiff is unable to state, and is proceeding to drill another well upon said premised for the purpose of producing oil and gas or oil or gas therefrom, and threatens that he will drill other and further wells and will produce therefrom oil and gas or oil or gas; and that the oil and gas so being mined and produced on said land is being sold and
36 disposed of by him the said Albert W. Shulthis and the proceeds thereof converted by the said Albert W. Shulthis and his co-defendants Edmond McKay and Perry McKay and John V. McKay to their own use without in any manner accounting to this plaintiff for any part thereof, and that said defendants are so producing said oil, selling the same and converting the proceeds thereof to their own use without any right in them or either of them to so produce said oil and without any title thereto and without the consent of the plaintiff D. A. McDougal, and that the plaintiff D. A. McDougal is the sole and exclusive owner of all the oil so produced or that may be so produced by said defendants from said premises; that plaintiff is informed and believes and avers the fact to be that the defendant Albert W. Shulthis has entered upon said premises and is mining the same for oil and gas and producing oil and gas therefrom under and by virtue of a purported lease contract with his co-defendants Edmond McKay and Perry McKay and John V. McKay, but that the plaintiff D. A. McDougal has not signed said contract and has not a copy thereof and is unable to set forth in this petition the precise terms and conditions of said purported lease contract.

VIII.

That the entry upon said lands and premised by Albert W. Shulthis and the mining of the same for oil and gas and the drilling of the wells thereon and the production of oil and gas therefrom as in the last preceding paragraph of this petition alleged and set out, is, as plaintiff is informed and believes and as plaintiff charges the fact to be, under the false claim that the father of Andrew J. Berryhill deceased, George Franklin Berryhill, inherited the title to the lands and premises hereinbefore described, in fee
37 simple absolute with power of conveyance of the same, and that by virtue of the conveyance from George Franklin Berryhill to Edmond and Perry McKay and the subsequent conveyance by Edmond and Perry McKay to John V. McKay, said defendants Edmond and Perry McKay and John V. McKay became vested with the title to said lands and premises in fee simple absolute, and that said defendants Edmond and Perry and John V. McKay are vested with title to the oil and gas therein and thereunder, and have a right to make and execute a valid lease for oil and gas mining purposes, upon the lands and premises hereinbefore

mentioned and described, that Albert W. Shulthis, under and by virtue of his pretended lease contract with said Edmond, Perry and John V. McKay has the right to enter upon said lands and to prospect thereon for oil and gas and to drill wells thereon and to mine the same for oil and gas and to produce oil and gas therefrom and to sell and dispose of the same, and that the said defendant Albert W. Shulthis with his co-defendants Edmond McKay, Perry McKay and John V. McKay, are entitled to the proceeds arising and accruing from the oil and gas so mined and produced from said lands, but that the claim of said defendants is wholly without right, and that tha plaintiff D. A. McDougal and no other person is entitled to said oil and gas and to the proceeds arising and accruing from the sale and disposition thereof.

IX.

That the title of the plaintiff D. A. McDougal to the lands and premises in controversy in this action and the claim of the defendants Albert W. Shulthis, Edmond McKay, Perry McKay and John V. McKay, is dependent upon the construction of the laws and treaties of the United States and upon the effect of the
38 acts of Congress and treaties between the United States of America and the Creek Nation or Tribe of Indians, as hereinbefore set out, and of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas adopted and put in force in Indian Territory, and which thereby became a law of the United States of America, it being the contention of the plaintiff in this case that the true construction of said laws and treaties and of said Chapter 49 of the Statutes of Arkansas, adopted and put in force in the Indian Territory and in the Creek Nation thereof hereinbefore pleaded, created a life estate only in George Franklin Berryhill, the father of Andrew J. Berryhill deceased, and that the fee title to said lands, subject only to said life estate, vested in the uncles and aunts of Andrew J. Berryhill Deceased hereinbefore mentioned and that under and by virtue of the Creek Supplement Agreement hereinbefore avverred and pleaded and chapter 49 of Mansfield's Digest of the Statutes of Arkansas, entitled "De-cents and Distributions" hereinbefore averred and pleaded, George Franklin Berryhill took a life estate only in the lands and premises hereinbefore mentioned and described and no more, and that the uncles and aunts of Andrew J. Berryhill deceased, to-wit, Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, inherited the fee title to said lands, subject only to the life estate of said George Franklin Berryhill, Clementine Berryhill, mother of said Andrew J. Berryhill deceased being a non-citizen of the Creek Nation and expressly excluded by Section Six of the Creek Supplemental Agreement from
39 any share of inheritance whatsoever in said lands or any part thereof, and it being the contention on the part of the defendants herein that by said laws and treaties of the United States and said Chapter 49 of Mansfield's Digest of the Statutes

of Arkansas, entitled "De-cents and Distributions" adopted and put in force in the Indian Territory and in the Creek Nation thereof, and thereby made a law of the United States, the lands and premised hereinbefore mentioned and described descended in fee simple absolute to George Franklin Berryhill, the father of Andrew J. Berryhill deceased, and that the uncles and aunts of George Franklin Berryhill deceased hereinbefore named took no share or estate whatsoever in or to said lands and premises, and the plaintiff avers and pleads that the rights of the respective parties to this suit are wholly dependent upon the true interpretation and construction of the said laws and treaties of the United States hereinbefore specifically averred and pleaded, including Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, which, by adoption, became a law of the United States with reference to the descent and distribution of the lands of the Creek Nation, and the plaintiff D. A. McDougal specially avers and pleads that the true intent, meaning and interpretation of said laws and treaties created and vested in George Franklin Berryhill, the father of Andrew J. Berryhill, deceased, a life estate only in said lands and no more, and that the uncles and aunts of Andrew J. Berryhill deceased hereinbefore named, inherited the fee title to said lands, subject only to a life estate in said George Franklin Berryhill, and that his grantees, Edmond and Perry McKay took by their deed from him an estate for the life of said George Franklin Berryhill only and no more, and that neither of the defendants herein has any other or greater estate in said premised than a life estate only, for and during the life of George Franklin Berryhill.

Premises considered, Plaintiff prays:

First. That the defendants be required to answer, but not under oath, answer under oath being hereby expressly waived, the precise nature of the contract under which the defendant Albert W. Shulthis is proceeding to prospect for and mine oil and gas upon the lands and premises hereinbefore described, and whether his contract with his co-defendants Edmond McKay, Perry McKay and John V. McKay is verbal or in writing, and if in writing, to set forth a copy thereof, and that defendants be required to render a full and true account of all the oil and gas or oil or gas by them or either of them mined and produced from the premised described in this petition, and what sale or other disposition they have made of the same, and what amount they have received as the proceeds of the sale of the same, and what amount of oil is now on hand in storage or in pipe lines, and what amount of oil has been mined and produced and sold, the proceeds of which have not been collected and received by them, and from what person or persons, corporation or corporations, moneys are due and owing them or either of them for oil mined and produced from said premises, and in what amount; answer under oath as to all of said matters and things being hereby expressly waived.

Second. That a Receiver be appointed to take charge of all the wells now on said land or being drilled thereon and all the machinery, tools, implements and appliances now used in and upon said

premises for the mining and production of oil from said premises and all the oil that has been produced from said premises and remains undisposed of and all the oil that may continue to be produced from said premises during the continuance of this suit, from any wells already on the same which are producing oil, and
41 also of any wells which are producing gas, and to sell and dispose of any oil or gas from producing wells on said premises, and hold the proceeds thereof subject to the final order and disposition of this court, and to collect and receive the proceeds of any oil that has been produced from said premises and sold to other persons, the price of which has not already been paid over to and received by the defendants herein or some of them, and to sell and dispose of any oil that may now be in the pipe lines or in storage that has been produced from said premises, and to manage, control and preserve said property during the pendency of this litigation, and to hold all the funds arising from the sale and disposition of any oil or gas or the collection of any sums due for oil and gas already sold and disposed of, subject to the final orders and disposition of this court.

Third. That during the pendency of this litigation, the defendants and each of them be enjoined and restrained from drilling further wells or further prospecting and mining for oil or gas or oil and gas, upon the lands and premises hereinbefore mentioned and described, or any part thereof, and from selling any oil and gas mined and produced therefrom, or collecting or receiving the proceeds of any oil and gas at any time mined and produced from said premises; and that upon final decree herein, said injunction be made perpetual.

Fourth. That this court adjudge and decree that the plaintiff D. A. McDougal is the owner of the lands and premises mentioned and described in this petition subject only to a life estate therein in the defendants Edmond McKay and Perry McKay and John V. McKay, for and during the life of George Franklin Berryhill and no longer, and that his title be quieted and the defendants and all of their servants, agents and employees and all persons acting
42 by, through or under any of them or under color of any authority from them, be perpetually enjoined from setting up or claiming any right, title, or interest in or to the oil and gas in or under said lands and premised or mined and produced therefrom, or from asserting any right or title in said premises other than a life estate for the life of George Franklin Berryhill only, and that it be further adjudged and decreed that plaintiff D. A. McDougal is entitled to all the oil and gas heretofore produced from said premises and all the oil and gas or oil or gas hereafter produced from any wells drilled upon the said premises by the defendants or either of them, and that said D. A. McDougal is entitled to continue to produce oil and gas from any wells so drilled upon said premises by the defendants or either of them, and to market the oil therefrom and sell and dispose of the same and collect and receive the proceeds therefrom.

Fifth. That defendants be required to account fully for all of the oil at any time taken by them or either of them from said premises, and all of the gas so taken by them or either of them and *and* received and marketed to their own use, and that the amount *g*hereof be by decree of this Court ascertained and a judgment rendered in favor of the plaintiff D. A. McDougal and against the defendants Albert W. Shulthis, Edmond McKay, Perry McKay and John V. McKay, for the amount so found by the Court, and for all of his costs in this behalf laid out and expended.

Sixth. That the court make all such other and further orders and enter such other and further decree in the premises as the
43 facts may warrant and the Court shall in equity and good conscience deem proper.

P. C. WEST,
Attorney for Plaintiff.

STATE OF OKLAHOMA,
County of Creek, ss:

I, D. A. McDougal, having been first duly sworn, upon oath state: That I am the plaintiff in the foregoing action; that I have read the foregoing petition, and that the matters and things set forth in said petition are true.

D. A. McDOUGAL.

Subscribed and sworn to before me this 5 day of April, 1913.

[Seal of District Court of Tulsa County, Oklahoma.]

W. W. STUCKEY,
District Clerk.
By J. A. LASWELL.

44 EXHIBIT "A."

General Warranty Deed.

(With Relinquishment of Dower.)

This indenture made and entered into this 5th day of June, one thousand, nine hundred and six by and between George F. Berryhill and Clementine Berryhill, his wife, of Sapulpa, I. T., party of the first part, and Edmond McKay and Perry McKay of Bixby I. T., parties of the second part.

Witnesseth:

That the said parties of the first part, for and in consideration of the sum of Two Thousand and no/100 Dollars, in hand paid the receipt of which is hereby acknowledged, do*es* hereby grant, bargain, sell, convey and confirm unto the said parties of the second part the following described real estate and premises situate in the Muskogee or Creek Nation, and within the limits of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, the east half of the northwest quarter of the northeast quarter and the southwest quarter of the northwest quarter of the northeast quarter of Section 13, Township 17 North, and Range 12 East, of the Indian Base and Meridian, in the Ind. Ter., containing 70 acres more or less.

the above described land being a part of the allotment of Andrew J. Berryhill our deceased son. Said Andrew J. Berryhill died about October 1st 1901. We being the sole and only heirs of said Andrew J. Berryhill, deceased, together with all the improvements thereon, and the appurtenances and immunities thereunto belonging or in any wise appertaining thereto.

To have and to hold The aforesaid premises to the said Edmond McKay & Perry McKay and unto their heirs and successors in fee simple forever; and we the said George F. Berryhill and
45 Clementine Berryhill for ourselves and our heirs, executors and administrators do covenant with the said Edmond McKay and Perry McKay and their heirs, successors and assigns, that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that we have good right to sell and convey the same to the said Edmond McKay & Perry McKay as aforesaid; and that we will and our successors, heirs, executors and administrators shall warrant and defend the same to the said Edmond McKay & Perry McKay and their heirs, successors and assigns forever, against the lawful claims and demands of all persons.

And I, Clamantine Berryhill of Sapulpa, I. T., wife of the said George F. Berryhill, for and in consideration of the said sum of money, do hereby release and relinquish unto the said parties of the second part all my right and dower and himestead in and to the said lands.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

his
GEORGE F. x BERRYHILL. [SEAL.]
mark.
CLEMENTINE BERRYHILL. [SEAL.]

Witness to mark:

LAFE SPEER.
AL CAYMOD.

UNITED STATES OF AMERICA,
Indian Territory,
Western Judicial District:

Be it remembered, That on this day came before me, the undersigned, a Notary Public in and for the Western Judicial District of the Indian Territory, aforesaid, duly commissioned and acting as such George F. Berrynill and Clementine Berryhill, his wife,
46 to me personally well known as the persons whose names appear in the within and foregoing deed of conveyance, as one

of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on the same day also voluntarily appeared before me, the said Clementine Berryhill, wife of said George F. Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will, executed said deed, and signed and sealed the relinquishment of dower and homestead in the foregoing deed, for the consideration and purposes therein contained and set forth, and without compulsion or undue influence of her said husband.

47 EXHIBIT "B."

Quit Claim Deed.

This identure made on the 19th day of Aug. A. D. One Thousand Nine Hundred and Ten by and between Edmond McKay and Perry McKay of the Counties of Muskogee and Tulsa, and State of Oklahoma, parties of the first part, and John V. McKay, of the County of Knox and State of Missouri, party of the second part.

Witnesseth That said parties of the first part, in consideration of the sum of Seven Hundred Dollars and other considerations to them paid by the party of the second part, the receipt of which is hereby acknowledged, do by these presents, remise, release, and forever quit claim unto the said party of the second part, the following described lots, tracts, or parcels of lands, lying, being and situated in the Counties of Creek and Tulsa, and State of Oklahoma, to-wit:

Undivided one third of the North East one fourth (¼) of Northwest fourth (¼) of Section Eighteen (18) and East one half (½) of North West one fourth (¼) of North East one fourth (¼) and the South West One fourth (¼) of the Northwest one fourth (¼) of the North East one fourth (¼) of Section Thirteen (13) all in Township Seventeen (17) North, Range Twelve (12) East.

To have and to hold the same, with all the rights, immunities, privileges and appurtenances thereunto belonging unto the said party of the second part, and his heirs and assigns, Forever: so that neither the said parties of the first part, nor their heirs, nor any person or persons for them in their names or behalf, shall or will hereafter claim or demand any right or title to the aforesaid premises, or any part thereof, but they and every one of them shall, by these presents, be excluded, and forever barred.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above
48 written.

Signed, Sealed and delivered in our presence and witnessed by us:

EDMOND McKAY. [SEAL.]
FLORENCE McKAY. [SEAL.]
PERRY McKAY. [SEAL.]
GUSTA McKAY. [SEAL.]

STATE OF MISSOURI,
County of Knox, ss:

On this 19th day of August, 1910, before me personally appeared Edmond McKay and Florence McKay his wife and Perry McKay and Gusta McKay his wife to me known to be the persons described and who executed the foregoing instrument, and acknowledged that they executed the same as their free act and deed.

In testimony whereof, I have hereunto set my hand and affixed my official seal, at my office in Knox City, Missouri, the day and year first above written.

[SEAL.] ALEX B. ANDERSON,
Notary Public.

My term as Notary Public will expire April 10th, 1912.

Filed for record in Tulsa County, Tulsa, Okla., June 18, 1912, at 4.30 o'clock P. M.

[SEAL.] H. C. WALKLEY,
Register of Deeds.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Lewis Cline, Register of Deeds in and for the above named County and State, do hereby certify that the within and foregoing instrument is a true and correct copy of a like instrument now of record in this office, and recorded in Book 128, page 342.

Dated this 4th day of April, A. D. 1913.

[SEAL.] LEWIS CLINE,
Register of Deeds.

49 EXHIBIT C.

Know all men by these presents:

That we, Martha E. Lee Kiefer, and Smith Kiefer, her husband, of Kiefer, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100.00 (*Dollars*) cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns, forever, all our right, title, claim and interest, in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East half of the Northwest Quarter of the Northeast Quarter, and the southwest quarter of the northwest quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased,

with all the improvements and privileges and appurtenances thereunto belinging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns, forever, And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we the said Martha E. Lee Kiefer, and husband, Smith Kiefer, have hereunto set our hands and seals this the 20 day of August, 1907.

[SEAL.] MARTHA E. LEE KIEFER.
[SEAL.] SMITH KIEFER.

50 UNITED STATES OF AMERICA,
Western District of Indian Territory:

On this 20th day of August, 1907, before me, T. J. Sullivan, a Notary Public, within and for the Western District of the Indian Territory, appeared in person, Smith Kiefer, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Martha E. Lee Kiefer, wife of the said Smith Kiefer, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In Testimony Whereof, I have hereunto set my hand as such Notary Public, at —— in said District and Territory, on the 20th day of August, 1907.

[SEAL.] T. J. SULLIVAN,
Notary Public.

My commission expires April 8, 1911.

51 EXHIBIT "D."

Know All Men by These Presents:

That I, Stanford Berryhill of Kiefer, Western District, Indian Territory, for and in consideration of the sum of one hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns, forever all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18,

Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the North West Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To Have and To Hold the aforegranted premises to the said D. A. McDougal his heirs and assigns forever. And I covenant with the said D. A. McDougal that I will warrant and defend the title to the aforegranted premises against the lawful claim of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I Nannie Berryhill, wife of the said Stanford Berryhill, do hereby release and quit claim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

In Witness Whereof, we the said Stanford Berryhill and wife Nannie Berryhill, have hereunto set our hands and seals
52 this the —— day of August, 1907.

STANFORD BERRYHILL. [SEAL.]
NANNIE BERRYHILL. [SEAL.]

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this — day of August, 1907, before me, M. Lee Dudley a Notary Public, within and for the Western District of the Indian Territory, appeared in person Stanford Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Nannie Berryhill, wife of the said Stanford Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Kiefer, in said District and Territory, on the 16th day of August, 1907.

[SEAL.] M. LEE DUDLEY,
Notary Public.

My commission expires January 11, 1908.

53 EXHIBIT "E."

Know All Men by These Presents:

That I, Columbus Berryhill, of Stone Bluff, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17, North, Range 12 East, and the Sourhwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

With all the improvements and privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I, Emma Berryhill, wife of the said Columbus Berryhill, do hereby release and quit claim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

54 In Witness Whereof, we the said Columbus Berryhill and wife Emma Berryhill, have hereunto set our hands and seals this the 21st day of August, 1907.

COLUMBUS BERRYHILL. [SEAL.]
EMMA BERRYHILL. [SEAL.]

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 21st day of August, 1907, before me, E. E. Riley, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Columbus Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Emma Berryhill, wife of the said Columbus Berryhill,

to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will, signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Stone Bluff, in said District and Territory, on the 21st day of August, 1907.

[SEAL.] E. E. RILEY,
Notary Public.

My commission expires June 18, 1908.

55 EXHIBIT "F."

Know all men by these Presents:

That I, Theodore Berryhill, of Sapulpa, Western District Indian Territory, for and in consideration of the sum of One Hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained, and sold and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17, North, Range 12, East, being part of the allotment of Andrew J. Berryhill, deceased.

With all the improvements, privileges and appurtenances thereunto belonging or any wise appertaining.

To have and to hold the aforegranted premises to said D. A. McDougal, his heirs and assigns, forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And, for the consideration aforesaid and for divers other good and valuable considerations, I Rilla Belle Berryhill, wife of the said Theodore Berryhill, do hereby release and quit claim to the said D. A. McDougal, his heirs and assigns, all my rights, claim or possibility of dower in or to the aforegranted premises.

56 In witness whereof, we the said Theodore Berryhill, and wife, Rilla Belle Berryhill, have hereunto set our hands and seals the 16th day of August, 1907.

THEODORE BERRYHILL. [SEAL.]
RILLA BELLE BERRYHILL. [SEAL.]

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 16th day of August, 1907, before me, R. C. Kinnaird a Notary Public, within and for the Western District of the Indian Territory, appeared in person Theodore Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that of this day voluntarily appeared before me, Rilla Belle Berryhill, wife of the said Theodore Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her husband, declared that she had of her own free will assigned the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public in Sapulpa in said District and Territory on the 16th day of August, 1907.

[SEAL.] R. C. KINNAIRD,
Notary Public.

My Commission expires June 22, 1909.

57 EXHIBIT "G."

Know all men by these Presents:

That I, William Berryhill, of Sapulpa, Western District, Indian Territory, for and in consideration of the sum of One Hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, Claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns, forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the consideration aforesaid, and for divers other good

and valuable considerations, I, Alice Berryhill, wife of the said William Berryhill, do hereby release and quit claim to the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

58 In witness whereof, we the said William Berryhill and wife, Alice Berryhill, have hereunto set our hands and seal this the 16th day of August, 1907.

his
[SEAL.] WILLIAM x BERRYHILL.
mark.
[SEAL.] ALICE BERRYHILL.

Witness:
R. C. KINNAIRD.
JOE SELF.

UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 16th day of August, 1907, before me R. C. Kinnaird a Notary Public, within and for the Western District of the Indian Territory, appeared in person William Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Alice Berryhill, wife of the said William Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Sapulpa, I. T., in said District and Territory on the 16th day of August, 1907.

[SEAL.] R. C. KINNAIRD,
Notary Public.

My Commission expires June 22, 1909.

59 EXHIBIT "H."

Know all men by these Presents:

That we, Mary Kiefer, and Charlie Kiefer, her husband of Sapulpa, Western District of the Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100.00) *Dollars*, cash in hand paid, the receipt of which is hereby acknowledged, have t*jos* day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all our right, title, claim and interest in and to the following described

real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the Title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we the said Mary Kiefer and husband Charlie Kiefer, have hereunto set our hands and seals this the 16th day of August, 1907.

[SEAL.] MARY KIEFER.

his

[SEAL.] CHARLIE x KIEFER.

mark

Witness:
R. C. KINNAIRD.
MARY KIEFER.

60 UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 16th day of August, 1907, before —— —— a Notary Public within and for the Western District of the Indian Territory, appeared in person Charlie Kiefer, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same, for the consideration and purposes mentioned therein, and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Mary Kiefer, wife to the said Charlie Kiefer, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Sapulpa, I. T., in said District and Territory on the 16th day of August, 1907.

[SEAL.] R. C. KINNAIRD,
Notary Public.

My commission expires June 22, 1909.

61 EXHIBIT "1."

Know All Men by These Presents:

That we, Mrs. Josie Morton and Thomas Morton, her husband of Bald Hill, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100.00) *Dollars* cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal and to his heirs and assigns forever all our right, title and claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we, the said Josie Morton and husband Thomas Morton, have hereunto set our hands and seals this the 20th day of August, 1907.

JOSIE MORTON. [SEAL.]
his
THOMAS x MORTON.
mark.

Witness- to mark:
E. E. RILEY.
W. S. McCRAY.

62 UNITED STATES OF AMERICA,
Western District, Indian Territory:

On this 20th day of August, 1907, before me, E. E. Riley a Notary Public within and for the Western District of the Indian Territory, appeared in person Thomas Morton, to me personally well known as the person whose name appears on the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Josie Morton, wife to the said Thomas Morton, to me well known to be the person whose name appears upon the within and

foregoing deed, and, in the absence of her said husband, declared that she had of her own free will executed the same, for the purposes therein contained, and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Morris, in said District and Territory, on the 20th day of August, 1907.

[SEAL.]

E. E. RILEY,
Notary Public.

My Commission expires June 18, 1907.

63 Said petition of the plaintiff is endorsed on the back as follows: D. A. McDougal vs. A. W. Shulthis, et al. Petition. District Court, State of Oklahoma, County of Tulsa. Filed April 5, 1913. W. W. Stuckey, Clerk.

64 And the same day, towit, the 5th day of April, 1913, the plaintiff filed the following præcipes for summonses in this cause:

65 In the District Copurt of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendants.

To the Clerk of Said Court:

Issue summons in the above entitled cause, and direct the same to the Sheriff of Muskogee County, State of Oklahoma, for the defendant Edmond McKay.

Action brought for quieting title, the appointment of a receiver and for an accounting.

Defendants required to answer on or before the 5 day of May, 1913.

Make summons returnable 15th day of April, A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis et al. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5 1913. W. W. Stuckey, Clerk.

66 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL
vs.
A. W. SHULTHIS et al.

Præcipe for Summons.

To Clerk of Said Court:

Issue summons in the above entitled cause, and direc- the same to the Sheriff of Tulsa County, State of Oklahoma, for the defendant Perry McKay.

Action brought for quieting title, and appointment of a receiver and for an accounting.

Defendants required to answer on or before the 5 day of May, 1913.

Make summons returnable 15 day of April, A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis, et al. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5 1913. W. W. Stuckey, Clerk.

67 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL
vs.
A. E. SHULTHIS et al.

Præcipe for Summons.

To the Clerk of Said Court:

Issue summons in the above entitled cause, and direct the same to the Sheriff of Knox County, State of Missouri, for the defendant, John V. McKay.

Action brought for quieting title, the appointment of a receiver and for an accounting.

Defendants required to answer on or before the 15th day of June, 1913.

Make summons returnable 15th day of April, A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5 1913. W. W. Stuckey, Clerk.

68 In the District Court of Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL
vs.
A. W. SHULTHIS et al.

Præcipe for Summons.

To the Clerk of Said Court:

Issue Summons in the above entitled cause, and direct the same to the Sheriff of Montgomery County, State of Kansas, for the defendant Albert W. Shulthis.

Action brought for quieting title, the appointment of a receiver and an accounting.

Defendants required to answer on or before the 15 day of June, 1913.

Make summons returnable 15 day of April A. D. 1913.

Dated this 5 day of April, A. D. 1913.

P. C. WEST,
Attorney for Plaintiff.

Endorsements: No. 3528. District Court, Tulsa County, Okla. Præcipe for summons. D. A. McDougal vs. A. W. Shulthis et al. P. C. West, Attorney. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 5, 1913. W. W. Stuckey, Clerk.

69 Upon the 5th day of April, 1913, summons was issued out of the said court in said cause to the Sheriff of Montgomery County, Kansas, for the defendant Albert W. Shulthis, which summons was returned and filed on the 12th day of April, 1913, and is in the words and figures following, towit:

70 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendant-.

Summons.

The State of *Kansas* to the Sheriff of Montgomery County, Greetings:

You are hereby commanded to notify Albert W. Shulthis that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma, and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County, on or before 60 days after the date of service, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court of Tulsa in said county this 5th day of April A. D. 1913.

W. W. STUCKEY, *Clerk,*
[SEAL.] By BERTHA M. BLACK, *Deputy.*

Suit brought for quieting title, the appointment of a Receiver and an accounting.

If the defendant fail to answer, plaintiff will take judgement for the sum of $— with interest thereon at the rate of — per cent. per annum from the — day of —— 191–, and cost of suit.

W. W. STUCKEY,
District Clerk,
By BERTHA M. BLACK, *Deputy.*

71 *Sheriff's Return.*

STATE OF OKLAHOMA,
—— *County, ss:*

Received this *24*it April 7th, 1913, at 9:30 o'clock A. M., and served the same upon the following persons, defendants, within named, at the time following, to wit: Albert W. Shulthis April 7, 1913 by delivering to *each and* said defendant, personally, in said County, a true and certified copy of the within summons, with all the endorsements thereon.

R. W. LEWIS, *Sheriff.*

Sheriff's Fees:
Service and return, first person.. $.50.

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis, et al. District Court, State of Oklahoma, County of Tulsa. Apr. 9, 1913. W. W. Stuckey, Clerk.

72 On April 5, 1913, there was issued out of said Court a summons in said cause to the defendant Perry McKay, which said summons was returned and filed on the 12th day of April, 1913, and is in the words and figures following, towit:

73 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendants.

Summons.

The State of Oklahoma to the Sheriff of Tulsa County, Greeting:

You are hereby commanded to notify Perry McKay that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma, and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County, on or before the 5th day of May, 1913, or said petition will be taken as true and judgement rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Tulsa, in said County, this 5th day of April, A. D. 1913.

[SEAL.] W. W. STUCKEY, *Clerk*,
By BERTHA M. BLACK, *Deputy*.

Suit brought for Quieting title, the appointment of a receiver, and for an accounting.

If the defendant fail to answer, plaintiff will take judgement for the sum of $— with interest thereon at the rate of — per cent. per annum from the — day of —— 191– and cost of suit.

[SEAL.] W. W. STUCKEY. *Clerk*,
By BERTHA BLACK, *Deputy*.

74 *Sheriff's Return.*

STATE OF OKLAHOMA,
Tulsa County, ss:

Received this writ April 5, 1913, at — o'clock — M., and served the same upon the following persons, defendants, within named, at

the times following, towit: Perry McKay, April 12th, 1913 by leaving for said defendant at his usual place of residence in said county, with a member of his family over fifteen years of age, towit, Mrs. Perry McKay, wife of said defendant, a true and certified copy of the within summons, with all the endorsements thereon.

W. W. McCULLOUGH, *Sheriff*,
By T. S. HIGGINS, *Deputy*.

Sheriff's Fees:

Service and return, first person...	$.50
1 copy summons.....	.25
Mileage 48 miles.....	4.80
Total	$5.55

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis, et al. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 12, 1913. W. W. Stuckey, Clerk.

75 Upon the 5th day of April 1913, there was issued out of said court a summons to the defendant John V. McKay, which summons was returned and filed on the 14th day of April, 1914, and is in the words and figures following, towit:

76 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,

—

A. W. SHULTHIS et al., Defendants.

Summons.

The State of Missouri to the Sheriff of Knox County, Greeting:

You are hereby commanded to notify John V. McKay that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County, on or before 60 days after date of service, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the

seal of said Court at Tulsa in said County this 5th day of April, A. D. 1913.

[SEAL.] W. W. STUCKEY, *Clerk*,
By BERTHA M. BLACK, *Deputy*.

Suit brought for quieting title, the appointment of a receiver, and for an accounting.

If the defendant fail to answer, plaintiff will take judgment for the sum of $—, with interest thereon at *the* — per cent. per annum from the — day of ——, 191–, and cost of suit.

W. W. STUCKEY, *Clerk*,
By BERTHA M. BLACK, *Deputy*.

77 *Sheriff's Return.*

STATE OF MISSOURI,
Knox County, ss:

Received this writ April 7th, 1913, at — o'clock — M., and served the same upon the following persons, defendants, within named, at the times following, to-wit: John V. McKay, April 11th, 1913, by delivering to *each and* said defendant, personally in said County a true copy of the within summons, with all the endorsements thereon.

CHARLES ALLEN, *Sheriff*.

Sheriff's Fees:

Service and return, first person....$2.75, paid by pl'ff.

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis et al. District Court, State of Oklahoma County of Tulsa. Filed Apr. 14, 1913. W. W. Stuckey, Clerk. P. C. West, Attorney for Plaintiff.

78 And upon the 5th day of April, 1913, there was issued out of said Court a summons to the defendant Edmond McKay, which summons was served, returned and filed on the 17th day of April, 1913, and is in the words and figures following to wit:

79 STATE OF OKLAHOMA,
Tulsa County, ss:

In the District Court.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
A. W. SHULTHIS et al., Defendants.

Summons.

The State of Oklahoma to the Sheriff of Muskogee County, Greetings:

You are hereby commanded to notify Edmond McKay that he has been sued by D. A. McDougal in the District Court of Tulsa County, Oklahoma, and that he must answer the petition of said D. A. McDougal filed against him in said Court, in the City of Tulsa, in said County on or before the 5th day of May, 1913, or said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 15th day of April, A. D. 1913.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at Tulsa in said County, this 5th day of April, A. D. 1913.

[SEAL.]

W. W. STUCKEY, *Clerk,*
By BERTHA M. BLACK, *Deputy.*

Suit brought for quieting title, the appointment of a receiver and for an accounting.

If the defendant fail to answer, plaintiff will take judgment for the sum of $—, with interest thereon at the rate of — per cent per annum from the — day of ——, 191– and cost of suit.

W. W. STUCKEY, *District Clerk,*
By BERTHA M. BLACK, *Deputy.*

80 *Sheriff's Return.*

STATE OF OKLAHOMA,
—— *County, ss:*

Received this writ 12 April, 1913, at 2 o'clock P. M., and served the same upon the following persons, defendants, within named, at the times following, to-wit: Edmond McKay 12 April, 1913, by delivering to *each and* said defendant, personally, in said County a true and certified copy of the within summons, with all the endorsements thereon.

J. F. LEDBETTER, *Sheriff.*
R. E. PRITCHARD, *Deputy.*

Sheriff's Fees:

Service and return, first person	$.50
Copy 1 summons	.25
Mileage 10 miles	1.00
Total	1.75

Endorsements: No. 3528. In District Court. Summons. D. A. McDougal vs. A. W. Shulthis, et al. P. C. West, Attorney for Plaintiff. District Court, State of Oklahoma, County of Tulsa. Filed Apr. 17, 1913. W. W. Stuckey, Clerk.

81 And thereafter, towit, on the 9th day of March, 1914, there was filed the answer of the defendants Edmond McKay, Perry McKay and Albert W. Shulthis, which said answer is in the words and figures following, to-wit:

82 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Answer.

Come now the defendants Edmond McKay, Perry McKay, and Albert W. Shulthis by their attorneys, Ramsey & Thomas, and leave of Court being first had and obtained, file this their answer to the petition of the plaintiff herein, and allege and state:

1. That they admit the allegations of paragraph numbered one of said petition.

2. Further answering said petition, and particularly paragraph numbered two thereof, defendants deny that the plaintiff is the owner of the fee to the real estate in said paragraph two described and allege and state that the plaintiff has no right, title, interest or estate in or to the same, or any part thereof, and deny that defendants Edmond McKay, Perry McKay and John V. McKay, are the owners only of a life estate in said lands as in said petition set out.

3. Further answering said petition, and particularly paragraph three thereof, defendants admit the allegations contained in said paragraph three.

4. Further answering said petition, and particularly paragraph four thereof, defendants admit the allegations contained in said paragraph four.

83 5. Further answering said petition, and particularly paragraph five thereof, defendants allege and state that they ad-

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mit that on June 5th 1906 George Franklin Berryhill and Clementine Berryhill, mentioned in said petition as father and mother of Andrew J. Berryhill deceased, executed and delivered to the defendants, Edmond McKay and Perry McKay, their warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond McKay and Perry McKay all their right, title and interest in and to the lands in the petition described, and admit the recording of said deed as in said petition set forth, but defendants deny that by said deed there was conveyed to the said Edmond McKay and Perry McKay a life estate only in and to the lands and premises in the petition described.

And defendants admit that on or about the 9th day of August, 1910, the said Edmond McKay and Perry McKay, joining with them their wives, Florence McKay and Gusta McKay, executed and delivered to John V. McKay a deed of conveyance of an undivided one-third interest in and to said land, but defendants deny that by the execution and delivery of said deed the said John V. McKay became the owner only of an undivided one-third interest in and to a life estate during the life of the said George Franklin Berryhill, and defendants allege and state that under and by virtue of said conveyance the said defendant John V. McKay, became the owner in fee of an undivided one-third interest in and to said lands.

Defendants admit that the said Andrew J. Berryhill, deceased, left surviving him the following Uncles and Aunts:

Martha Lee Keifer, Sanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Keifer, and Josie Morton.

84 But defendants deny that said Uncles and Aunts inherited the fee in said land subject only to a life estate in the father, George Franklin Berryhill. And defendants deny that the said Uncles and Aunts inherited any interest whatsoever in and to the said lands or any part thereof, and allege and state that the said Uncles and Aunts never at any time owned any right, title or interest by inheritance, or otherwise, in and to said lands, or any part thereof.

Defendants admit the execution and delivery of the deeds as set forth in said petition executed to the plaintiff by the above named Uncles and Aunts of the said Andrew J. Berryhill, and admit the recording of said deeds as set forth in the petition, and admit that exhibits C, D, E, F, G, H, & I, are correct copies of said deeds, but defendants deny that the plaintiff acquired any interest whatsoever in or to said lands under *any* by virtue of the execution and delivery of said deeds, and deny that under and by virtue of said deeds or conveyances the plaintiff, D. A. McDougal, became vested with, and now is the owner of, any interest whatsoever in and to said lands, or any part thereof.

Defendants admit that in the month of May, 1901, there was born to George Franklin Berryhill and Clementine Berryhill, husband and wife, a son, the said Andrew J. Berryhill, and admit that the said George Franklin Berryhill is, and at all times mentioned in the petition was, a Creek Indian and a Citizen of the Creek Nation duly

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enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood, and admit that his name appears upon the Rolls of said Commission as a mixed blood Indian, and not as a full blood, and defendants admit that the said Clementine Berryhill,
85 wife and mother, at no time was a citizen of the Creek Nation, and admit that the said Andrew J. Berryhill died in the month of November, 1901, intestate and unmarried, leaving no brother or sister surviving him. Defendants admit that on or about October 8th, 1902, tha name of the said Andrew J. Berryhill was duly placed upon the tribal rolls of the Creek Nation as a citizen thereof by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 14th, 1902, and admit that in the year 1904 the said Commission set apart and allotted to the said Andrew J. Berryhill, deceased, the lands in the petition described, together with other lands. And admit that on or about October 10th, 1905 the United States of America, together with the Creek Nation, through the Principal Chief of the Creek Nation, and on behalf of the Creek Nation, did execute a deed or patent covering and describing said lands, which said patent was subsequently approved by the Secretary of the Interior, and defendants admit that by the execution of said patent the title in and to said land was conveyed and confirmed to the heirs of the said Andrew J. Berryhill, deceased, and defendants allege and state that under and by virtue of the execution and delivery of said patent there was conveyed, and became vested in the said George Franklin Berryhill, the father of said Andrew J. Berryhill, title in fee simple absolute in and to the lands in the petition of the plaintiff described.

And defendants allege and state that under and by virtue of said deed, executed as aforesaid on June 5th, 1906, and under and by virtue of the said deed executed as aforesaid on August 9th, 1910 by Edmond McKay and Perry McKay, and their wives, to John
86 V. McKay, the said Edmond McKay, Perry McKay and John V. McKay now own and hold the fee simple title to the above described lands.

Defendants deny that the oil and gas in and under said land is owned by, and is the property of, the plaintiff, and deny that the plaintiff has any right, title or interest in or to the said oil or gas, or any part thereof.

6. Further answering plaintiff's petition, and particularly paragraph six thereof, defendants deny that the plaintiff is the owner of all of the oil and gas in and under the lands in the petition described and deny that he has any right, title or interest in or to the same, or any part thereof, and defendants deny that the prospecting and drilling for oil and gas upon said lands has been done without authority, and deny that the same is in violation of any rights of the plaintiff in said premises, and deny that said prospecting and drilling constitutes a continuing trespass upon said land and denies that the same constitutes any waste or diminution of any estate of the plaintiff in or to said land, and denies that said operations wioll in any wise work plaintiff any injury whatsoever.

7. Further answering said petition, and particularly paragraph seven thereof, defendants admit that prior to the commencement of this suit the defendant, Albert W. Shulthis, had entered upon said lands, and had drilled oil and gas wells thereon and was producing oil and gas from said land, and admit that the said defendant, Albert W. Shulthis, is in possession of the said lands operating the same for oil and gas, but defendants deny that the said Albert W. Shulthis, or *and* of said defendants, are producing or selling oil or gas from said lands without right, and without any title thereto, and deny that the plaintiff, D. A. McDougal, is the sole and exclusive
87 owner of all the oil produced from said lands, or that may be produced from said lands, and deny that the plaintiff has any interest whatsoever therein. Defendants admit that the said defendant, Albert W. Shulthis, has entered upon said premises, and is mining the same for oil and gas, and is producing oil and gas therefrom under and by virtue of a lease contract with the co-defendants herein, Edmond McKay, Perry McKay and John V. McKay, and defendants allege and state that said contract is a written contract, by the terms of which the said defendant Albert W. Shulthis, has the sole and exclusive right to enter upon said premises and operate the same for oil and gas, and produce oil and gas therefrom; that by the terms of said contract the said Albert W. Shulthis binds himself to pay to the said lessors, as a royalty one-eighth of all the oil produced and saved from said leased premises; that said lease contract was, prior to the commencement of this suit, duly filed for record and recorded in the office of the Register of Deeds in and for Tulsa County, State of Oklahoma.

Further answering said petition and particularly paragraph eight thereof, defendants admit that the said Albert W. Shulthis has entered upon said lands, and is *poerating* the same for oil and gas under the claim that the father of Andrew J. Berryhill, deceased, George Franklin Berryhill, was the sole heir of the said Andrew J. Berryhill, deceased, but deny that the defendants herein assert their title by inheritance, but allege and state that under *any* by virtue of the patents executed and delivered as aforesaid by the United States of America and the Creek Nation, there was granted and conveyed to the said George Franklin Berryhill title in fee to the lands in the petition described, and defendants admit that by virtue of the conveyance from George Franklin Berryhill to Edmond Mc-
88 Kay and Perry McKay, and the subsequent conveyance by Edmond McKay and Perry McKay to John V. McKay, the said defendants, Edmond McKay, Perry McKay and John V. McKay, became vested with the title to said land and premises in fee simple, and are vested with title to the oil and gas in and under said land, and have a right to make and execute a valid lease for oil and gas mining purposes upon said land, and that the defendant, Albert W. Shulthis, under a lease contract with said Edmond McKay, Perry McKay, and John V. McKay, has the right to enter upon said lands and prospect the same for oil and gas, and to drill wells thereon, and produce oil and gas therefrom, and to sell and dispose

of the same. Defendants deny that the plaintiff, D. A. McDougal is entitled to said oil and gas, and to the proceeds arising and accruing from the sale and disposition thereof.

9. Further answering plaintiff's petition, and particularly paragraph nine thereof, defendants deny that they claim title to said land by descent but allege and state, as hereinbefore set forth, that they claim to be the owners in fee simple of said land under and by virtue of the execution and delivery of said patents by the United States of America and the Creek Nation to the heirs of the said Andrew J. Berryhill, deceased, and by the subsequent conveyance by George Franklin Berryhill to these defendants.

Defendants deny each and every other allegation in said paragraph nine not herein admitted or denied.

Wherefore, Defendants pray that the plaintiff take nothing by his petition herein, that the same be dismissed with prejudice, and that these defendants have their costs herein incurred.

RAMSEY & THOMAS,
Attorneys for Defendants.

89 We concent that this answer may be filed out of time.

ROSSER & COCHRAN,
Att'ys for Plaintiff.

Endorsements: No. 3528. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al., Defendants. Answer. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 9, 1914. W. W. Stuckey, Clerk. Ramsey & Thomas, Muskogee, Okla., Attorneys for Defendants.

90 And thereupon, on the same day, to wit, the 9th day of March, 1914, there was filed the Separate answer of the Defendant John V. McKay, which separate answer is in the words and figures following, to wit:

91 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Separate Answer of John V. McKay.

Comes now the defendant, John V. McKay, by his attorneys Ramsey & Thomas, and leave of Court being first had and obtained files this his answer to the petition of the plaintiff herein, and alleges and states;

That he hereby adopts and makes as his answer herein, the answer

filed herein by Edmond McKay, Perry McKay and Albert W. Shulthis.

And for further answer and defense to the petition of the plaintiff herein, this defendant alleges that on or about the 11th day of September. 1912. he as sole complainant. commenced a suit in the United States District — for the Eastern District of Oklahoma against the plaintiff herein, D. A. McDougal. as sole defendant; that said action is still pending in said Court and undetermined; that said suit is for the same identical cause of action mentioned in the petition of the plaintiff herein, and in said suit this defendant claims title in fee to an undivided one-third interest in and to the lands in controversy herein, and alleges that he is in possession of said land, and that he derives his title to said land under and by virtue of the conveyances mentioned and described in the petition of the
92 plaintiff herein; and this defendant further alleges in his said Bill of Complaint *is* said Court that the plaintiff herein asserts some title and interest in and to said lands adverse to the plaintiff under and by virtue of the deeds to the plaintiff herein, all as set forth in his petition herein. And in said pending suit this defendant as complainant, prays that he be adjudged to be the owner in fee of an undivided one-third interest in and to said lands, and that the plaintiff herein be declared to have no right, valid claim or title, or any interest whatsoever in said land, and that the deeds under which the plaintiff herein claims, and which are described i the petition herein, be delivered up to be canceled as clouds upon the title of this defendant to said lands.

Wherefore, This defendant prays that the petition of the plaintiff herein be dismissed as to him, and that he have his costs herein incurred.

RAMSEY & THOMAS,
Attorneys for Defendant John V. McKay.

We consent to the filing of the foregoing answer out of time.
ROSSER & COCHRAN,
Attorneys for Plaintiff.

Endorsements: No. 3528. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al. Defendants. Answer of John V. McKay. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 9 1914. W. W. Stuckey, Clerk. Ramsey & Thomas, Muskogee, Okla., Attorneys for Defendant.

93 In the District Court in and for Pawnee County, State of Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay et al., Defendants.

Transcript of the Evidence.

Be it remembered, That heretofore, to wit, on the 10th day of March, 1914, the same being one of the regular days of the March 1914 term of said Court, the above entitled cause came on for hearing before his Honor, L. M. Poe, Judge of said Court, both parties being present by counsel and having announced ready for trial.

Present:

Rosser & Cochran, by Judge M. E. Rosser, and L. O. Lytle, Esq., Appearing for the plaintiff.
Ramsey & Thomas, by C. L. Thomas, Esq., Appearing for the Defendants.

And thereupon the following proceedings were had, to wit:
94 Judge Rosser: We offer in evidence first the deposition of N. A. Gibson, taken on the 5th of March.
Mr. Thomas: We object to the offer of the deposition of N. A. Gibson for the reason same is incompetent, irrelevant and immaterial.
The Court: The objection to the offer will be sustained.
Judge Rosser: We except.
(Which deposition is attached hereto and appears at page 97.)
Judge Rosser: We offer the deposition of Mr. J. C. Stone.
Mr. Thomas: To which offer defendants object for the reason that the same is incompetent, irrelevant and immaterial.
The Court: Sustained.
Judge Rosser: We except.
(Which deposition is attached hereto and appears on page 103.
Judge Rosser: We offer the deposition of Mr. Guy L. Andrews of McAlester.
Mr. Thomas: To which offer defendants object for the reason that same is incompetent, irrelevant and immaterial.
The Court: Sustained.
Judge Rosser: We except.
(Which deposition is attached hereto and appears at page 128.)
Judge Rosser: We offer the deposition of Mr. Jean P. Day of McAlester.
Mr. Thomas: To which offer defendants object for the reason that same is incompetent, irrelevant and immaterial.
95 The Court: Sustained.
Judge Rosser: Exception.

(Which deposition is attached hereto and appears at page 132.)

Judge ROSSER: Now we offer to prove by Mr. Gray Carroll, of this city that he is a member of the bar and has been engaged in the practice here for the past eight years; that he is familiar with land titles and with Indian land questions; that he is familiar with the case of Shulthis vs. McDougal decided and reported in 170 Fed. 529; that prior to the time that decision was rendered that it was the opinion of a great majority of the bar of this part of the state—of the old Indian Territory—that the allotted lands to members of the Five Civilized Tribes were new acquisitions and not ancestral estates and that the inherited land that was bought prior to that decision was practically all bought on that theory and with the idea that the parent only had a life estate and that the collateral kindred owned the fee. And we offer to prove by him also that since that decision that it has not been acquiesced in by the bar; that members of the bar have continued to advise their clients that it is not safe to rely upon that opinion and that the only safe way that they could proceed in order to get a title that was beyond question was to buy both from the parents and from the collateral kindred and that the bar have never acquiesced in that opinion as being sound law; that they have never believed that it was good law.

We expect to prove practically the same facts by Mr. A. J.
96 Biddison.

We expect to prove by Mr. C. S. Walker and we offer him as a witness to prove that prior to the decision in the case of Shulthis vs. McDougal reported in 170 Fed. 529 that allotted lands were considered new acquisitions and not ancestral estates and that that was the general opinion of the bar of the Indian Territory and that all or practically all of the inherited lands that were sold prior to that decision were sold by the heirs and bought by the purchaser on the theory that the parent only owned a life estate, and that the parent only received a consideration based upon the theory that he or she or both were the owners of the life estate and that the collateral heirs owned the fee and that the collateral heirs were paid upon the theory that they were the owners of the fee.

We offer to make that proof.

Mr. THOMAS: To all of which offer defendants object for the reason that the evidence offered is incompetent, irrelevant and immaterial in that it does not go to prove or disprove any issues in this case.

The COURT: Sustained.

Judge ROSSER: Exception.

We offer to prove the same facts by Mr. D. B. Hughes who is a member of the bar of Sapulpa and who has practiced in this state fourteen years, that he knows the general opinion of the bar prior to the case of Shulthis vs. McDougal and that it was the general concensus of opinion of the bar that the allotted lands were
97 new acquisitions and not ancestral estates. We also offer to prove by him and expect to prove by him if permitted that since that decision that it has not been acquiesced in by the bar and that the members of the bar generally have *have* continued to advise

their clients in his part of the country that it was not safe to rely upon that opinion in purchasing inherited Indian lands, and that purchases of inherited lands have been made upon the theory that parents only owned the life estate and the collateral kindred owned the fee and the consideration has been paid on that theory and in that proportion and that practically all the land that was sold prior to that decision was bought and sold upon that theory and that a very great majority or a very much larger portion of the inherited lands of the Creek Nation that have been sold as inherited lands were sold prior to the rendition of that opinion and upon that theory that the land was new acquisitions.

We expect to prove the same facts by Mr. Harry Campbell of the Tulsa bar; we expect to prove the same facts by Frank P. Smith of the Sapulpa bar, and by Mr. J. F. Lawrence of Sapulpa and Mr. L. O. Lytle of Sapulpa.

We offer all these witnesses to make this proof.

Mr. THOMAS: To all of which offer defendants object for the reason that the same is incompetent, irrelevant and immaterial and that the evidence offered does not tend to prove or disprove any material issues in this case.

98 Judge ROSSER: We except.

We offer also the exhibits to the deposition of Mr. N. A. Gibson consisting of certain chapters of Mr. S. T. Bledsoe's work entitled "Indian Land Laws," both the first and the second editions, and also an article which I read before the Bar Association, and which are made exhibits to Mr. Gibson's deposition, for the purpose of showing that this decision was never acquiesced in by the bar of the state and has not been up to this time.

Mr. THOMAS: To which offer of evidence defendants object for the reason that the same is incompetent, irrelevant and immaterial.

The COURT: Sustained.

Judge ROSSER: Exception.

We offer to prove now by the witnesses that some of the District Judges refused to follow the decision and continued to decide cases upon the theory and to hold notwithstanding the opinion in the case of Shulthis vs. McDougal that allotted lands were new acquisitions, that the parents only received a life estate in cases of inherited lands, that the collateral heirs were thw owners of the fee.

We offer to prove this by several witnesses, and we also offer to prove by several witnesses that the county judges also refused to follow that decision and required it to be inserted in deeds where inherited lands were purchased that the parents were only selling a life estate.

Mr. THOMAS: Before making an objection to that offer, I
99 would like to—I don't believe, if the court please, that that is a proper offer unless he names his witnesses.

Judge ROSSER: All right I will name the witnesses and the judges.

Mr. THOMAS: All right.

Judge ROSSER: We offer to prove by Mr. L. O. Lytle and Mr. Frank P. Smith and Mr. D. B. Hughes that Judge W. L. Barnum, District Judge of the 22nd District refused to follow this decision

nand notwithstanding the decision continued to hold that the lands were new acquisitions, and that the parents only had a life estate. And I don't like to testify, but I believe in a case of this sort—would you consider it improper Mr. Thomas?

Mr. THOMAS: No, not at all.

Judge ROSSER: I will testify myself that while I was District Judge I refused to follow it in a number of cases and also have personal knowledge that Judge D. A. Richardson refused to follow it and can testify to that fact and offer to testify to that fact now.

Mr. THOMAS: To which offer defendants object for the reason that the evidence offered is incompetent, irrelevant and immaterial.

Judge ROSSER: And that Judge Josiah G. Davis, County Judge of Creek County refused to follow it.

Mr. THOMAS: To which offer defendants object for the reason that the same is incompetent, irrelevant and immaterial.

The COURT: Sustained.

100 Judge ROSSER: Save an exception. We except to the ruling of the court in excluding all of this evidence.

Mr. THOMAS: If the court please, one of these defendants, John V. McKay, has in a separate defense which I didn't mention in my opening statement, but there is another suit pending involving this same controversy and such was the fact prior to the institution of this suit. John V. McKay instituted—he is a resident of Missouri, by the way—he instituted a suit in the United States District court for the Eastern District of Oklahoma to quiet his title to this third interest against all claims of D. A. McDougal and that suit is still pending, and counsel for the plaintiff and ourselves have entered into an agreed statement of facts covering this one defense and I would like to file this agreed statement of facts.

The COURT: Let the agreed statement of facts be filed.

Which said agreed statement of facts is in the words and figures following, to-wit:

101 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Agreed Statement of Facts.

Come now the parties hereto, by their attorneys of record, and stipulate and agree that the following is a true and correct statement of certain of the facts pertaining to the issues in this cause, and that the matters of fact covered by this statement shall not be subject to contradiction by other testimony or evidence, and shall not in any wise impair the right of any of the parties hereto to make proof

of other material facts herein not covered by this agreed statement, and it is agreed that this statement shall be filed in the record as part of the record in this cause and submitted to the court accordingly. It is agreed that the following are the facts to-wit:

First. That on or about the 10th day of September, 1912, the defendant herein, John V. McKay, filed in the United States District Court for the Eastern District of Oklahoma, his bill of complaint against D. A. McDougal, the plaintiff herein, as defendant; that said suit was docketed as Number 1878; that said bill of complaint is shown by a copy thereof attached hereto, made a part of this agreed statement of facts, and marked "Exhibit B."

102 Second. That thereafter the plaintiff herein, D. A. McDougal, filed his answer in said cause in the United States District Court for the Eastern District of Oklahoma; that said answer is shown by a true and correct copy thereof attached hereto, made a part of this agreed statement of facts, and marked "Exhibit B."

Third. That said suit, wherein John V. McKay is plaintiff and D. A. McDougal is defendant, is now pending, and undisposed of, and was pending and undisposed of, at the time of the institution of this suit.

Fourth. It is further especially agreed that Exhibit A attached to the petition of the plaintiff herein is a true and correct copy of the deed executed June 5th, 1906, by George F. Berryhill and Clementine Berryhill, his wife, as grantors, to the defendants, Edmond McKay and Perry McKay, as Grantees, and that said deed shall be taken and considered as in evidence in this cause, and considered by the court without further proof of the execution or delivery of the same.

Dated this 9th day of March, 1914.

ROSSER & COCHRAN,
Attorneys for Plaintiff.
RAMSEY & THOMAS,
Attorneys for Defendants.

103 EXHIBIT A.

In the United States Court for the Eastern District of Oklahoma.

Number 1878.

JOHN V. MCKAY, Complainant,
VS.
D. A. MCDOUGAL, Defendant.

Bill in Equity.

To the Honorable Circuit Judges of the United States for the Eastern District of Oklahoma:

John V. McKay, a citizen of the State of Missouri, brings this his bill against the defendant above named, and thereupon your orator complains and says:

First.

That he is now and was at all times herein mentioned a citizen and resident of and within the State of Missouri. That at all times herein mentioned the said defendant, D. A. McDougal, was and is a citizen of that part of the state of Oklahoma now comprising the Eastern District of Oklahoma.

Second.

That in the month of May, A. D. 1901, there was born to one George Franklin Berryhill and one Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill. That said George Franklin Berryhill is and at all times herein mentioned was a Creek Indian and a citizen of the Creek Nation and his name appears on the approved roll of the Creek Nation as a mixed blood Indian citizen of said Nation.

104 That the said Clementine Berryhill is not and no time has been a citizen of the Creek Nation.

That the said Andrew J. Berryhill departed this life in the month of November, 1901 intestate and unmarried, that he left no issue nor brother nor sister surviving him.

That thereafter and on or about the 8th day of October, 1902, the name of the said Andrew J. Berryhill was duly placed on the approved Creek Indian Roll of the said Creek Nation, and that thereafter there was allotted by the Commission to the Five Civilized Tribes to the heirs of the said Andrew J. Berryhill, deceased, the following described land situated in the Creek Nation, and being in the Eastern District of Oklahoma, to-wit:

The East half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13) Township Seventeen (17) North Range Twelve (12) East, Tulsa County, Oklahoma,

together with other lands not herein involved.

That thereafter and on the 10th day of October, A. D. 1905, the United States of America together with the Creek Nation did execute a deed or patent to said land, whereby the United States of America and the Creek Nation did sell and convey unto the heirs of the said Andrew J. Berryhill, deceased, the above described lands.

That thereafter, and on October 31, 1905, said deed or patent was duly approved by the Secretary of the Interior of the United States, and is recorded in volume 2 at page 504 of the rec-

105 ords in the office of the Commissioners to the Five Civilized Tribes.

Third.

That at the death of the said Andrew J. Berryhill he left surviving him, as his only heir, his father, the said George Franklin Berryhill.

Fourth.

That on the 5th day of June, 1906, the said George Franklin Berryhill was the owner in fee of the above described lands, and on

the said 5th day of June, 1906, the said George Franklin Berryhill, joining with him his wife, the said Clementine Berryhill, did execute and deliver to Edmond McKay and Perry McKay, his certain warranty deed, wherein and whereby he did convey to the grantees named in said deed, in fee simple, the above described lands.

That said deed was thereafter and on June 5, 1906, duly filed for record, and is recorded in volume 9 at page 387 of the records in the office of the Register of Deeds at Sapulpa, Oklahoma.

Fifth.

That thereafter and on the 19th day of August, 1910, the said Edmond McKay and Perry McKay, joining with them their wives, Florence McKay and Gusta McKay, did execute and deliver to the complainant herein their certain deed whereby for a valuable consideration they did convey to the complainant herein an undivided one-third interest in and to the lands above described.

That said deed was duly filed for record on June 18, 1912, and is recorded in book 128 at page 342 of the records in the office of the Register of Deeds in and for Tulsa County, Oklahoma.

That under and by virtue of the said conveyance this complainant is the *w*oner in fee of an undivided one-third interest in
106 and to said above described lands.

Sixth.

That the complain-t is in possession of said books and that the matter in dispute herein exceeds exclusive of interest and costs the sum of Three Thousand Dollars ($3,000.00).

Seventh.

That on the 20th day of August, 1907, Martha E. Lee Keifer, joining with her husband, Smith Kiefer, did execute and deliver unto the defendant herein their certain deed wherein they did purport to transfer and convey unto the defendant all their right, title claim an interest in and to the above described lands and real estate. That said deed was thereafter recorded in book 24 at page 498 in the records of the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed and made a part of this Bill as "Exhibit A."

Eighth.

That on the 16th day of August, 1907, Stanford Berryhill executed and delivered to the defendant herein his certain deed wherein he did purport to sell and convey unto the said defendant all his right, title, claim and interest in and to the above described lands. That thereafter the said deed was filed for record and was recorded in book 24 at page 492 of the records in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit B", and made a part of this Bill.

Ninth.

That on the 21st day of August, 1907, Columbus Berryhill did execute and deliver to the said defendant his certain deed whereby he did purport to sell and convey unto the said defendant
107 all his right, title, claim and interest in and to the above described lands. That said deed was thereafter filed for record and was recorded in book 24 at page 525 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit C" and made a part of this Bill.

Tenth.

That on the 16th day of August, 1907, Theodore Berryhill did execute and deliver to the said defendant his certain deed whereby he did purport to sell and convey unto the said defendant all his right, title, claim and interest in and to the above described lands. That said deed was thereafter filed for record and was recorded in book 24 at page 494 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed id herewith filed as "Exhibit D" and made a part of this Bill.

Eleventh.

That on the 16th day of August, 1907, William Berryhill did execute and deliver to the said defendant his certain deed whereby he did purport to sell and convey unto the said defendant all his right, title, claim and interest in and to the said above described lands. That said deed was thereafter filed for record and was recorded in book 24 at page 496 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit E" and made a part of this Bill.

108 Twelfth.

That on the 16th day of August, 1907, Mary Keifer, joining with her husband, Charley Keifer, did execute and deliver to the said defendant their certain deed whereby they did purport to sell and convey unto the said defendant all their right, title, claim and interest in and to the above described lands.

That said deed was thereafter filed for record and was recorded in book 24 at page 501 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit F" and made a part of this Bill.

Thirteenth.

That on the 20th day of August, 1907, Josie Morton, joining with her her husband, Thomas Morton, did execute and deliver to said defendant their certain deed whereby they did purport to sell and convey unto the said defendant all their right, title, claim and interest in and to the above described lands.

That said deed was thereafter filed for record and was recorded in book 24 at page 500 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit G" and made a part of this Bill.

Fourteenth.

That on the 18th day of October, 1907, Airy Anne Berrhill did execute and deliver to the said defendant her certain deed whereby she did purport to sell and convey unto the said defendant all her right, title, claim and interest in and to the above described lands.

That said deed was thereafter filed for record and was re-
109 corded in book 28 at page 523 of the records now in the office of the Register of Deeds in and for Creek County, Oklahoma; and a copy of said deed is herewith filed as "Exhibit H" and made a part of this Bill.

Fifteenth.

That the said defendant under and by virtue of the said deeds executed to him *and* aforesaid, claims some interest to the lands adverse to this complainant, and that the said defendant is without any right, whatever, and has no right, estate, title or interest in or to the said lands or any part thereof, and that the said deeds and the record thereof constitute clouds upon the title of the complainant in and to his interest as herein set forth in and to the above described lands.

In consideration whereof, and inasmuch as this complainant can have no adequate remedy at law, and to — end therefore that the defendant herein may, if he can, show why the complainant should not have the relief herein prayed, and may make a full disclosure and discovery of all the matters aforesaid, and to the best of his remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged, this compiainant prays;

First. That the defendant be required to set forth his right, title and interest, if any he has, in and to the above described lands.

Second. That this honorable court by a proper decree herein adjudge the complainant to be the owner in fee of an undivided one-third interest in and to the above described lands, and that the defendant has no right, valid claim or title therein, nor any interest whatsoever in said premises.

Third. That the title and interest of the complainant in
110 said lands be quieted and that the said defendant be perpetually barred and enjoined from setting up or asserting any title or interest in said premises adverse to the title and interest of this complainant.

Fourth. That the deed hereinbefore mentioned and executed by the said Mary E. Lee Keifer on August 20, 1907, and the deed excuted as aforesaid by Stanford Berryhill on August 16, 1907, and the deed executed as aforesaid by Columbus Berryhill on August 21, 1907, and the deed executed as aforesaid by Theodore Berryhill on

August 16, 1907, and the deed executed as aforesaid by William Berryhill on August 16th, 1907, and the deed executed as aforesaid by Mary Keifer and Charley Keifer, her husband, on August 16, 1907, and the deed executed as aforesaid by Mrs. Josie Morton and Thomas Morton, her husband, on August 20, 1907, and the deed executed as aforesaid by Arie Anne Berryhill on October 18, 1907, all be delivered up to be cancelled as clouds upon the title of the complainant herein.

Fifth. That the court grant to the complainant your writ of subpœna directed to the defendant, D. A. McDougal, and to such others as shall in the discretion of the court appear necessary to the hearing and final determination of this cause, commanding them on a day certain to appear and answer to this bill of complaint, but not under oath. An answer under oath is hereby expressly waived; and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience; and that the complainant have such other and further relief to which in equity and good conscience he may be entitled.

____ ____,

____ ____,

Solicitors for Complainant.

111 "EXHIBIT B."

In the United States District Court for the Eastern District of Oklahoma.

No. 1878.

JOHN V. MCKAY, Complainant,

vs.

D. A. MCDOUGAL, Defendant.

Answer.

Comes the defendant, D. A. McDougal, and for his answer to the bill of complaint filed and exhibited against him herein, states and shows unto the Court:

I.

That the defendant in this suit, D. A. McDougal, has brought an action in the district court of Tulsa County, State of Oklahoma, against the complainant in this action, John V. McKay, and that Edmond McKay and Perry McKay, who own a two-thirds interest in said lands as tenants in common with the said John V. McKay, complainant in this action, are made parties defendant in said action; and that Albert W. Shulthis, who is in possession of said land by virtue of a purported oil lease from the said John W. McKay, Edmond McKay and Perry McKay, is also a party defendant. Defendant alleges that said Edmond McKay and Perry McKay are

citizens and residents of the state of Oklahoma and of the Eastern District of said state, and that this defendant, D. A. McDougal, is also a resident of the state of Oklahoma and of the Eastern District thereof, and that the said District Court of Tulsa County,
112 State of Oklahoma, has jurisdiction to try and determine all the matters in controversy between and among all of said parties and to give a full and complete relief. Defendant alleges that this suit was brought by the complainant, John V. McKay, for the purpose of defeating the jurisdiction of the said District Court of Tulsa County, State of Oklahoma. Defendant alleges that if he is compelled to defend this action in this court that it will cause him a great deal of expense and trouble and will not in any way shorten or make less expensive the suit in the District Court of Tulsa County, and that should this court try this case that it will cause a multiplicity of suits with added expense and vexation, and that the comity, which exists between the State and the Federal Courts requires, as he believes, that this case be dismissed out of this court and that the complainant in this action be required to litigate the question involved in the action pending in the said district court of Tulsa County. Defendant alleges that this suit was brought at the instigation of the said Edmond McKay and Perry McKay and that they have charge of the conduct of this suit and that the complainant, John V. McKay, in bringing this suit is acting upon their advice, both as to where it should be brought and as to the attorneys that should be employed; and that the said Edmond McKay and Perry McKay actually employed the counsel appearing in this action for the complainant, John V. McKay, and that though nominally this is a suit between John V. McKay and the defendant D. A. McDougal, and really and substantially Edmond McKay and Perry McKay are interested in the suit in that they hope to obtain a decision in this action that will benefit them in their suit in said court.

113 II.

That whether the complainant, John V. McKay, is now and was at the date of the institution of this suit a citizen and resident of and within the State if Missouri, this defendant is without information; but the defendant admits that D. A. McDougal is a citizen and resident of that part of the State of Oklahoma now comprising the Eastern District thereof.

III.

The defendant admits that in the month of May, 1901, there was born to George Franklin Berryhill and Clementine Berryhill, his wife, a son named Andrew J. Berryhill; that George Franklin Berryhill was a Creek Indian citizen of mixed blood, and that Clementine Berryhill was at no time a citizen of the Creek Nation; he admits that Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried leaving no issue and no brothers or sisters surviving him. Defendant admits that on or about the 8th of October 1902 the name of Andrew J. Berryhill

was duly placed on the approved Indian roll of the Creek Nation, but denies that thereafter there was allotted by the Commission to the Five Civilized Tribes, to the heirs of Andrew J. Berryhill deceased the East Half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13) Township Seventeen (17) North, Range Twelve (12) East, in Tulsa County, Oklahoma, but states that said land was duly allotted by said Commission in the name of Andrew J. Berryhill, deceased, and a certificate of allotment was issued therefor and that thereafter, on or about the 10th day of October, 1905, there was issued a deed or patent
114 for said lands, by the United States of America and the Creek Nation, whereby said lands were conveyed to the heirs of Andrew J. Berryhill, deceased, but the heirs of said Andrew J. Berryhill being in no manner named in said deed or patent, nor any description or particular designation of who said heirs were, being given or set forth therein; and this defendant admits that said deed or patent was duly approved by the Secretary of the Interior and recorded as in complainant's bill alleged.

IIII.

This defendant denies that at the date of the death of Andrew J. Berryhill he left surviving him as his only heir his father George Franklin Berryhill, and states that said Andrew J. Berryhill at the date of his death left him surviving uncles and aunts as follows: Martha A. Lee Keifer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Keifer and Josie Morton and that upon the death of Andrew J. Berryhill the lands mentioned and described herein descended to his father, George Franklin Berryhill and said uncles and aunts, the said George Franklin Berryhill taking a life estate and no more and the said uncles and aunts taking a fee simple title to said premises subject to a life estate in George Franklin Berryhill.

V.

This defendant denies that on the 5th day of June, 1906, or ever at any time the said George Franklin Berryhill was the owner in fee of the lands in complainant's bill described, and denies that George Franklin Berryhill ever at any time owned more than a life estate in said lands.

115 VI.

Defendant admits that a deed from Edmond McKay and Perry McKay joined by their wives, Florence McKay and Gusta McKay conveying an undivided one-third interest in and to the lands described in the bill in this action was executed to the complainant and recorded as alleged in said bill; but defendant denies that by virtue of said conveyance the complainant is the owner in fee of an undivided one-third interest in and to the lands described in said bill. Defendant alleges that Edmund McKay, and Perry McKay

never had more than a life estate in said land and that the complainant, John V. McKay, only received an undivided one-third interest in the life estate owned by the said Edmund McKay and Perry McKay, and defendant denies that John V. McKay is the owner of an undivided interest in the fee to said lands, and denies that he has any claim or right to any greater estate than an undivided one-third interest in life estate therein.

VII.

This defendant denies that complainant is in possession of the lands and premises described in complainant's bill herein, and denies that he ever was at any time in possession of said lands and premises, and denies that the matter in dispute herein, exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars, and states that the interest of complainant could not in any event be more than an undivided one-third interest in a life estate in said property, which would be of much less value than the sum or amount of Three Thousand Dollars.

VIII.

Defendant admits the execution and delivery of the deed from Martha E. Lee Kiefer and the record thereof, as set forth in
116 the 7th paragraph of complainant's bill, and that Exhibit "A" is substantially a copy of said deed; and admits the execution and delivery to him of the deed from Stanford Berryhill and the record thereof as set forth in the 8th paragraph of the complainant's bill and that the Exhibit "B" is a substantial copy thereof; and admits the execution and delivery to him of the deed from Columbus Berryhill and the record thereof as set forth in the 9th paragraph of the complainant's bill and that Exhibit "C" is a substantial copy thereof; and admits the execution and delivery to him of the deed from Theodore Berryhill and the record thereof set forth in the 10th paragraph of the complainant's bill and that Exhibit "D" is a substantial copy thereof; and admits the execution and delivery to him of the deed from William Berryhill and the record thereof as set forth in the 11th paragraph of the complainant's bill and that Exhibit "E" is a substantial copy thereof; and admits the execution and delivery to him of a deed from Mary Keifer and the record thereof as set forth in the 12th paragraph of the complainant's bill and that Exhibit "F" is a substantial copy thereof; and admits the execution and delivery to him of a deed from Josie Morton and the record thereof as set forth in the 13th paragraph of the complainant's bill and that Exhibit "G" is a substantial copy thereof; and admits the execution and delivery to him of a deed from Airy Anne Berryhill and the record thereof as set forth in the 14th paragraph of the complainant's bill, and that Exhibit "H" is a substantial copy thereof.

IX.

This defendant admits that under and by virtue of the deed mentioned in the last preceding paragraph, he claims an interest in the

lands mentioned and described in complainant's bill, and
117 says that under and by virtue of these deeds he is the owner of the fee simple title to said lands subject only to a life estate in Edmond and Perry McKay; and this defendant denies that said deed and the record thereof constitute a cloud upon the title of the complainant in and to his interest in said lands, and denies that complainant has any title to said lands or any interest therein or thereto.

Wherefore: Having fully answered, defendant prays that the bill of complaint exhibited herein against him be dismissed at complainant's costs.

——— ———,
——— ———,
Solicitors for Defendant.

STATE OF OKLAHOMA,
County of Creek, ss:

I, D. A. McDougal, having been first duly sworn upon oath state that I am the defendant in the foregoing suit; that I have read the foregoing answer, and that the matters and things set forth in said answer are true.

——— ———.

Subscribed and sworn — by me this — day of June, 1910.

——— ———,
Notary Public.

My Commission expires ———.

118 On the back of which agreed statement of facts appear the following endorsements: No. 3528. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al., Defendants. Agreed statement of facts. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10, 1914. W. W. Stuckey, Clerk. Ramsey & Thomas, Muskogee, Okla., Attorneys for ——— ———.

119 Judge ROSSER: We have nothing further to offer.
Mr. THOMAS: Defendants rests.
The COURT: The decree will be of course in favor of the defendants practically upon the pleadings and upon the exclusion of the evidence offered. I am satisfied all these things could be proven if it hadn't been that the Supreme Court had decided it. I think it is true, universally understood, that the members of the bar held the same opinion as you adhere to but I don't think they have got the power to overrule our court of last resort.
The above are all the proceedings had on the trial of the above entitled cause.
The depositions of N. A. Gibson J. C. Stone, Guy L. Andrews and Jean P. Day, and the exhibits attached to N. A. Gibson's deposition appear on the pages following:

120 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Stipulation.

It is hereby agreed and stipulated by and between the attorneys for the respective parties in the above styled and numbered cause that depositions of witnesses may be taken at the office of Rosser & Cochran in the City of Muskogee, in Muskogee County, Oklahoma on the 5th day of March, A. D. 1914, between the hours of eight o'clock A. M. and six o'clock P. M. and that if the taking should not be completed on that day that it may be continued from day to day at the same place and between the same hours until completed, and said attorneys respectively waive service of notice of said taking;

It is further stipulated that said depositions may be taken in short hand and afterwards transcribed, and both parties waive the signing of said depositions and agree that same may be read in evidence, subject to objections on account of incompetency, irrelevancy or immateriality, without the signatures of said witnesses.

ROSSER & COCHRAN,
Attorneys for Plaintiff.
RAMSEY & THOMAS,
Attorneys for Defendants.

121 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Depositions of N. A. Gibson, Taken on the 5th Day of March, 1914, in Accordance with the Foregoing and Attached Stipulation.

Appearances:

Rosser and Coe-ran for Plaintiff.
Ramsey and Thomas for Defendants.

Thereupon the plaintiff produced N. A. Gibson who after being duly sworn, testifies as follows:

Q. What is your name?
A. N. A. Gibson.

Q. What is your occupation?
A. Lawyer.
Q. Live in Muskogee?
A. I do.
Q. How long have you been in the practice here?
A. A little over twenty years.
Q. During that time what has been the nature of your practice?
A. Principally civil business.
Q. Have you had considerable land practice?
A. I have had a great deal, involving land titles, ever since the allotment of lands here.
Q. Are you familiar with the case of Shulthis vs. McDougal et al.?
A. Yes, sir.
Q. Did you have occasion prior to the rendition of that opinion to advise your clients as to whether or not an allotment in one of the Five Civilized Tribes was a new acquisition or an ancestral estate?

122 A. Yes, I did.

Q. What did you advise your clients upon this question prior to that decision?
A. That in my opinion it was a new acquisition.
Q. Did you know what the general concensus of opinion of the bar of the Indian Territory was, prior to that decision?
A. I think so.
Q. What was the opinion?
A. Generally that Indian allotments were new acquisitions.
Q. You mean by that——
A. I mean a very great majority of the lawyers with whom I ever discussed the matter or who I ever heard discuss it, were of the opinion that these titles were new acquisitions. In fact, I don't recall ever to have heard more than two lawyers contend that they were ancestral estates.
Q. After that opinion was rendered you continued to advise your clients with regerence to the land titles?
A. Yes, sir.
Q. After the opinion was rendered, what course of action did you advise where people were purchasing land which had been allotted to Indians who died without issue, leaving surviving them a parent or parents and collateral kindred, as to who they should buy from?
A. I continued to advise them that they should at all times procure conveyances, not only from the parent, but also from the collateral kindred, and this course of advice continued until the decision of the Oklahoma Supreme Court in the Pigeon v. Buck case, which was decided about May, 1913, since which time I have advised them that in my opinion the law as decided by that case would be held conclusive and have advised them it was no longer necessary to take conveyances from the collateral kindred.

123 Q. Do you know what the practice of other lawyers in the Indian Territory side of Oklahoma has been with reference to this question since the Shulthis decision?

A. I cannot say that I know enough about the practice of other lawyers to state the uniform rule.

Q. Bearing in mind the act of April 21, 1904, and the act of April 26, 1906, and the Act of May 27, 1908, and bearing in mind that the opinion of Shulthis vs. McDougal, et al., was rendered June 9, 1909, and appealed to the Supreme Court of the United States and dismissed for want of jurisdiction on the 7th day of June 1912, what proportion of the titles where this question was involved, has been purchased on the theory that the parent only owned a life estate and what proportion on the theory that parent owned the fee?

A. I should say that a very large proportion, probably 95% of all lands purchased from heirs of deceased Indian allottees have been purchased on the theory that the parent inherited the life estate only and not the fee.

That is all.

Cross-examination by Mr. THOMAS:

Q. The fact is that every lawyer and practically every man engaged in the buying and selling of Indian land is more or less skeptical about every decision until it has been passed on by the Supreme Court of the United States?

A. Yes sir.

Q. The decision in the Shulthis-McDougal case and in the Pigeon-Buck case, are given about the same consideration and the same following as any other decision of the Circuit Court of Appeals or the Supreme Court of Oklahoma relative to Indian Land titles, are they not?

124 A. Yes, I think about the same.

Q. Your statement to the effect that probably 95% of the land purchased from heirs of Indian Allottees were purchased on the theory that they were newly acquired estates, is made from what basis?

A. Simply from observation of the very great number of titles in which I have had occasion to investigate. The matters in which my clients were interested and from observation generally.

Q. But more particularly as a result of your experience in your practice?

A. Yes.

Judge ROSSER:

Q. You were acquainted with S. T. Bledsoe?

A. Yes, sir.

Q. You know where he practiced law prior to going to Oklahoma City?

A. Yes, he was at Ardmore for *q* number of years.

Q. Do you know the extent and nature of his practice down there?

A. Very large and general, involving a great many matters connected with the title to Indian lands.

Q. What was his reputation as a lawyer?

A. Very good, indeed.

Q. You are acquainted with his book or books entitled "Indian Land Laws"?
A. Yes, sir.
Q. Do you know whether the Bar of the state generally have bought this book, or rather this work, or not?
A. I think they have generally, yes.
Q. Are you a member of the State Bar Association?
A. I am.
Q. You are acquainted with me, your questioner?
A. Yes sir.
Q. Do you know that in Mr. Bledsoe's book Indian Land Laws he challenges the decision of Shulthis vs. McDougal, et al.?
A. That is my recollection.
Q. Did you know that I read *and* argument before the Bar
125 Association in which I made an assault on that decision?
A. Yes, I heard the paper read.
Q. Do you know how many members there are in the Bar Association?
A. Probably two hundred. I don't know how many.

The plaintiff here offers in evidence Sec. 62. 109 and 127 First Edition of Bledsoe's Indian Land Laws, Sec. 244 of Second Edition of Bledsoe's Indian Land Laws; also article read by M. E. Rosser before the Bar Association on Feb. 15, 1910, and they are marked respectively Exhibits A, B, C, D, & E and are hereto attached.

Mr. THOMAS:

Q. You were familiar with Mr. Bledsoe's first edition Indian Land Titles?
A. Yes, sir.
Q. In that work he expressed his opinion as to the ultimate disposition of a great many of our questions arising over Indian Land titles which at the time of the publication had not been decided by any court of last resort.
A. Yes, I think that is true.
Q. Don't you know it to be a fact that since the publication of that edition, the court of last resort has disagreed with Mr. Bledsoe?
A. I think that is true.

Whereupon the further taking of depositions was continued until the 7th day of March 1914, at the same place and between the same hours.

126 On this 7th day of March, the taking of depositions in the above styled and numbered cause was resumed in accordance with the agreement of the parties and the continuance, and the plaintiff appearing by his attorney- Rosser and Cochran and the defendants appearing by their attorneys Ramsey & Thomas, thereupon the plaintiff produced J. C. STONE, who after being duly sworn, says:

Direct examination by Judge ROSSER:

Q. What is your name?
A. J. C. Stone.

Q. You live in Muskogee?
A. I do.
Q. Are you a member of the bar, a lawyer?
A. I am.
Q. How long have you been engaged in the practice of law?
A. About fifteen years.
Q. At what places have you practiced law in Oklahoma or the Indian Territory?
A. At Okmulgee and at Muskogee.
Q. How long did you practice at Okmulgee?
A. I located there in June 1902, stayed there six years, came to Muskogee and have been here about six years.
Q. Okmulgee and Muskogee are both in the Creek Nation?
A. They are.
Q. What has been the nature and extent of your practice, Mr. Stone?
A. I have been actively engaged as a lawyer all these years, principally in land matters.
Q. You were offered a position as a member of the Supreme Court Commission of the State of Oklahoma some months ago by the Supreme Court itself, were you not?
A. I was.
Q. You declined that position because you preferred to remain in the practice?
A. Yes, sir.
127 Q. You are familiar with the decision in the case of Shulthis vs. McDougal et al., reported in Federal 170, at page 529?
A. Yes, I have examined that several times. I examined it as soon as it was published I think.
Q. Prior to the publication of that decision, what had been your custom in advising clients with reference to what are called Indian allotments, as to whether they were new acquisitions or ancestral estates?
A. I had advised them that they were new acquisitions.
Q. Do you recall what had been the general consensus of opinion of the bar of Oklahoma prior to that decision as to whether they were new acquisitions or ancestral estates:
A. I think I do. I believe I could safely say I know the views of a great many lawyers, particularly the bar of the Indian Territory.
Q. In the Creek Nation?
A. Yes, sir.
A. What were they?
A. They held that the allotments were new acquisitions and descended as such under the Arkansas law put in force here and as is set forth in the Kelly-Ayers case reported in 15 Arkansas.
Q. Since that opinion was handed down, what have you advised your clients when they were purchasing inherited lands, lands inherited from allottees, as to the steps they should take to get title?
A. Until the matter was passed upon by the Supreme Court of Oklahoma, following the Shulthis case, I advised my clients that they

should save themselves on both theories, as it was uncertain what the result might be.

Q. You say "save themselves on both theories". What do you mean by that?

A. That is to say, they should take conveyance so as to ac-
128 quire the title in the event the allotment is finally held to be an ancestral estate.

Q. In other words, both from the parent and from the collateral heirs?

A. Yes, sir.

A. Mr. Stone, bearing in mind the verious Acts of Congress affecting restrictions on Indian Lands, that is, the Act of April 21, 1904, April 26, 1906, May 27, 1908, and also bearing in mind that the opinion of the Circuit Court of Appeals in the Shulthis case was rendered *in* June 9, 1909, and the decision of the State Supreme Court was rendered in May, 1912 (I believe that was the date), what portion of lands which came without the purview of that decision would you say had been purchased on the theory that they were new acquisitions and what proportion on the theory that they were ancestral estates?

A. My opinion is, that all purchases prior to the Shulthis case were taken on the theory that the allotments were new acquisitions and after the Shulthis case I think there were some lawyers who advised their clients that they could safely follow the Shulthis case, but I believe the general practice was to demand conveyances from the collateral heirs until the Supreme Court followed the Shulthis case.

Q. With reference to the date of that decision, did you say that more inherited lands were sold before that decision or has been sold since?

A. A great part of it was sold before the Shulthis case.

Cross-examination by Mr. THOMAS:

Q. It is generally conceded, Mr. Stone, isn't it, that the decision of the Circuit Court of Appeals in the case of Shulthis vs. McDougal et al., was a very salutatory decision?

A. I believe that conclusion has been reached. At first very few lawyers, in my opinion, accepted that opinion as solid, but
129 they gradually came into the belief that it was.

Q. You don't get my meaning exactly. Isn't it generally conceded that the decision in the case of Shulthis *bs*. McDougal was extremely beneficial to all inherited titles in the point of making the inherited land more valuable?

A. In my opinion the bar generally accepted that decision as pro*b*iding a *s*umpler method of descent and therefore a simpler method of determining the — of the inherited title.

Q. And don't you know from your own experience in passing on inherited titles that where you did consider an allotment as a new acquisition, that then in a great many cases it would be almost impossible to, with any degree of certainty, tell whether or not you had acquired all of the collateral heirs because of the lax condition of domestic relations heretofore ex*h*isting in the Five Tribes.

A. I think all lawyers experienced difficulty in that respect. I did myself, considerable difficulty.

Q. With reference to the percent of titles which were bought on the theory that they were new acquisitions, the fact is that the question as to whether these lands in the Creek Nation were new acquisitions or ancestral estates was almost entirely lost prior to November 16, 1907, the date of the admission of Oklahoma as a State?

A. Between April 24, 1904, was the period of greatest activity in the sale of inherited lands and therefore that was the period when the most difficulty arose.

Q. You were familiar with the decision of the Supreme Court of Oklahoma in the Pigeon-Buck Case?

A. Yes, sir.

Q. In that case you know that the Supreme Court of Oklahoma follows the opinion of the Circuit Court of Appeals in the
130 Shulthis-McDougal case?

A. I so understand.

Q. Don't you know that since the decision of the Supreme Court of Oklahoma in the case of Pigeon vs. Buck, at least a very large per cent of the lawyers have given it as their opinion that where a Creek allottee died intestate, and unmarried, without issue, that the parent inherited the entire interest in the land?

A. I expect they have done so.

Judge ROSSER:

Q. The land that was purchased prior to statehood and prior to the Shulthis decision on the theory that it was a new acquisition, was purchased both from the parents and the collateral heirs of course?

A. Yes.

Q. Do you know how the consideration, the full consideration was divided as between the parents by the supposed owners of the fee simple?

A. In many cases it was a matter of agreement between the parent and the others heirs.

That is all.

131 *Certificate.*

I, Ruth Lyons, a Notary Public within and for the County of Muskogee, State of Oklahoma, do hereby certify that the above named witnesses were by me first duly sworn to testify the truth, the whole truth, and nothing but the truth, in the case aforesaid, and that the depositions by them given were reduced to writing by me, a disinterested person, and the same were taken on the 5th day of March, 1904, and the 7th day of March, 1914, respectively between the hours of 8 o'clock A. M. and 6 o'clock P. M. of the said days, at the office of Rosser and Cochran, in the City of Muskogee, in the County of Muskogee, State of Oklahoma, and that I am not attorney

or a relative of either of said parties, or otherwise interest- in the event of this action.

[SEAL.] RUTH LYONS,
Notary Public.

My commission expires Oct. 29th, 1917.

132 *Exhibits to the Deposition of Mr. N. A. Gibson.*

EXHIBIT "A."

"Are the lands of the allottees of the Chickasaws and Choctaws upon their death ancestral of a new acquisition under the Arkansas statute of descent and distribution?

This is a most important question, because the heirs who take if the estate is ancestral are different from those who take if the estate is a new acquisition. It has been held both by the Circuit Court of Appeals for the Eighth Circuit (Ligonet — al. v. Johnston et al., 164 Fed. 672) and the Supreme Court of the United States (Stephens v. Cherokee Nation, 174 U. S. 488) that the lands of the Choctaw and Chickasaw Nations are public lands "held in trust for the members of the tribes * * * only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people?

If the unconditional fee were in the members of the tribe and allotment meant only the partition of an estate, the estate received by the allottee would be ancestral. Such is not the case. The estate held by a member previous to allotment was a mere right of possession and could be alienated only by a member of the tribe. The estate received by the allottee is an absolute fee simple including the United States' possibility of reversion. The estate thus received by the allottee is unquestionably a much greater and more valuable one than his previous possessory right. He takes by deed or patent from the governor of the Chickasaw Nation and the principal chief of the Choctaw Nation, and not by inheritance. He takes without regard to whether his father and mother be living or dead.

133 It has been the practically unanimous opinion of lawyers residing in the Eastern District of Oklahoma concurred in by the Writer that such an estate is a new acquisition. This opinion is based upon the decisions of the Supreme Court of Arkansas construing this statute prior to its adoption and the decisions of other courts construing like statutes.

Recently the Circuit Court of Appeals for the Eighth Circuit in affirming the judgment of the lower court in Shulthis v. McDougal et al., 162 Fed. 331, held the estate of an allottee to be ancestral and not a new acquisition, holding that if the allottee's "father was the only parent through whom he derived his right, * * * to the father the land should pass. If the mother had been a member of the tribe, then the land should probably pass to the parents equally."

An appeal will probably be prosecuted from the judgment of the

Circuit Court of Appeals to the Supreme Court of the United States. Notwithstanding the great respect entertained for the judgment of that court, the matter will not be regarded as settled until determined by the Supreme Court of the United States. (Keely's Heirs v. McGuire, 15 Ark. 555; Scull v. Vaugine et al., 15 Ark. 695; Magnus v. Arnold, 31 Ark. 103; Gallaway v. Robinson, 19 Ark. 396; Hogan et al. v. Finley et.ux., 11 S. W. 1035; Wheelock v. Simons, 86 S. W. 830; West et al. vs. Williams et al. 15 Ark. 682; Higgins v. Higgins et al., 48 N. E. 943; In Re Donahue, 36 Cal. 329.)"

134 EXHIBIT "B."

"It has been the opinion of the writer that the lands of an allottee of the Creek tribe of Indians are upon his death a new acquisition within the meaning of the Arkansas statute of descent and distribution; but the circuit court of appeals for the Eighth Circuit in the case of Shulthis vs. McDougal et al., not yet reported, has recently held such lands to be an ancestral estate and not a new acquisition."

EXHIBIT "C."

"As to whether the allotment of a deceased Cherokee is an ancestral estate or a new acquisition is determined by the same statute applicable to the lands allotted to the Choctaw and Chickasaw allottees. For a full discussion of this subject see section sixty-two dealing with the same subject applicable to the Choctaw and Chickasaw allottees."

EXHIBIT "D."

"Are lands of the allottees of the Five Civilized Tribes, after they pass upon death to their descendants, an ancestral estate or a new acquisition under the Arkansas statute of descent and distribution?

If the unconditional fee to the tribal lands had been in the members of the tribe, and allotments had meant only partition of an estate, the estate received by the allottee would have been ancestral. Such was not the case. The estate in the land held by a member previous to allotment was a mere right of possession and could be alienated only to a member of the tribe. The estate received by an allottee is an absolute fee simple, including the possibility of
135 reversion vested in the United States prior to allotment. The estate thus received by the allottee is a larger and more valuable one than his previous possessory right. He takes by deed or patent from the Governor or principal chief of his tribe, acting on behalf of the tribe and with reference to whether his father or mother or both be living or dead.

For nearly ten years it was practically the unanimous opinion of lawyers residing in the eastern district of Oklahoma that the estate of the allottee is a new acquisition and not an ancestral estate. This

was based upon uniform interpretation given to this statute by the Supreme Court of Arkansas under conditions somewhat similar, though not identical, to those in the Indian Territory.

About the time the bar regarded the matter as settled the Circuit Court of Appeals for the Eighth Circuit held the estate of an allottee of the Creek Nation to be ancestral, and not a new acquisition. A review of this decision was sought in the Supreme Court of the United States, but the case was dismissed for want of jurisdiction.

The Supreme Court of the state has very recently followed the construction given to the Arkansas statute of descent by the Circuit Court of Appeals for the Eighth Circuit, holding that the estate received by the allottee in allotment to be ancestral and not a new acquisition. The case involved the construction of the Arkansas statute of descent as applied to a full-blood Creek Indian who died July 12, 1905, after receiving her patent, intestate, leaving surviving her a husband, father, mother, sister, and two brothers, all full-
blood Creeks. The father, mother and husband joined in a
136 conveyance, and the sister and brothers brought suit to recover
the property and clear title thereto.

After quoting from the opinion of the Circuit Court of Appeals in the Shulthis vs. McDougal case, the court concludes as follows: 'Many titles to lands on the eastern side of this state have been acquired on the strength of this decision, and to such an extent that the same has become a rule of property there * * *"

A writ of error has been sued out to have the judgment of the Supreme Court of the state in this cause reviewed by the Supreme Court of the United States.

It is extremely desirable that it be finally adjudged and without delay, whether the estate received by an allottee of the Five Civilized tribes is ancestral or a new acquisition, as the uncertainty of the law upon this subject is a source of great embarrassment in the development of the country. The author has never believed the rule prescribed in the case of Shulthis v. McDougal is sound or in harmony with either the language of the Arkansas statute or its interpretation prior to its extension over the Indian Territory. Neither does he believe that the rule there declared is capable of affording a solution of the difficulties arising out of the descent of allotted Indian lands.

The ancestral estate under the Arkansas statute is the estate of inheritance under the common law enlarged so as to include a give, grant or devise made by either of the parents. In such a case the estate descents to the children and their descendants, and in the absence of children of their descendants it ascends to those of
blood through whom the estate came, to the exclusion of those
137 of the bolld of the other parent. In the estates of inherit-
ance, in the absence of descendants, the property goes exclusively to the heirs of the deceased who are of the blood of the ancestor from whom the estate came, and in no event dies such an estate ascend to anyone who is not of the blood of the ancestor.

The new acquis-ion is substantially the estate by purchase of the common law, limited by having carved out of the same estate by

gift, grant or devise from the parents or either of them. In such a case the estate descends to the children and their descendants, and in the absence of children or their descendants ascends to the father for his lifetime, then to the mother for her lifetime, and then to the collateral kindred in fee; the fathers family being given preference only over the mother's family. Under the interpretation given to the Arkansas statute by the Circuit Court of Appeals for the Eighth Circuit and the Supreme Court of the state the courts and lawyers of the state are presented with the problem of following an ancestral estate through two separate and distinct lines of heirship, something unheard of in ancestral estates, and which probably will be difficult in practical application.

It will be observed that the Circuit Court of Appeals held that, inasmuch as one of the parents was not of Indian blood, the full title passed to that parent who was of Indian blood.

In the case decided by the Supreme Court of the state both parents were of Indian blood and survived the allottee, and it was held that the estate passed in equal moieties to the father and mother. Suppose that the father or the mother only had survived, would the entire estate — gone to the survivor, or would it have gone
138 half to the survivor and half to the heirs of the deceased parent? Upon the death of either of the parents without descendants, where both parents survive the allottee, by what rule is the right of descent to be determined?

These are only a few of the perplexing questions that will arise from the establishment of a rule creating two separate and independent ancestors to and from whom the descent of an ancestral estate must be followed."

139 *A New Acquisition as Appl'ed to Inherited Lands of the Five Civilized Tribes.*

By Judge M. E. Rosser, Poteau, Oklahoma.

The descent or devolution of property has always been, and probably will always be one of the chief concerns of a civilized government, and it would seem that the wisdom and experience of the ages would have devised a system before this that would render certain all questions affecting the title to lands by descent. But, notwithstanding the fact that the legislators of the world have been working on the subject since the beginning of individual ownership of land, questions continue to arise.

Mr. Jefferson wrote the Virginia Statutes of descent and distribution and in making the law upon that subject he changed entirely the old English system of having regard to the blood of the first purchaser and wrote a system founded on the affections of the heart. (Davis vs. Rose, 6 Rand. 355.) This system was intended to follow the natural flow of the affections and to require the property to descend in the same manner that natural affections would have disposed of it had the owner attempted to make disposition. The

system which he prepared was about the same as the Arkansas Statutes of descents and distributions and very little litigation ever arose with reference to its construction. But shortly after his code was adopted a statute was passed which provided in substance that where a child died without issue, having title to real estate derived by gift, defise or descent from one of his parents the whole should pass to his kindred on the side of his parent from whom it was derived, if any such kindred were living at the time of his death. Dr.
140 John B. Minor, commenting upon this statute in hes Institutes, says:

"This provision mars the symmetry of the original law of descent and comes out of Mr. Jefferson's "Quiver of choice arrows." It arose out of a solicitude to prevent estates going out of the families where they originally belinged and it is the only instance where any respect is paid by the statute to the blood of the first purchaser—and has given occasion to most of the litigation connected with our law descents."

The same desire to prevent estates from going out of families where they originally belonged actuated the early legislators of the state of Arkansas, and, after passing a general statute upon the subject, largely taken from the New York Code, but resembling the Virginia Statute, the state further provides that, "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs, but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided." This statute was carried into Mansfield's Digest of the Statutes of Arkansas and was extended over and put in force in the Indian Territory by act of Congress. There is a great diversity of opinion as to when it took effect in the Choctaw and Chickasaw Nations so far is it concerns children who were living when their allotments were selected, but that is another story. From the time it did take effect, until Statehood, children of the various Indian Tribes were dying without descendants and the question as to whether or not their allotments were New Acquisitions affects
141 a large amount of land on the eastern side of the State and it is a very important one to the lawyers of the Indian Territory side.

It was the opinion of most of the bar of Indian Territory that the estate of an allottee was a new acquisition within the meaning of the Statute and the lawyers who studied the land question of that part of the State were, with a few exceptions, very much surprised when the Circuit Court of Appeals for the Eighth Circuit, in the case of Shulthis vs. McDougal, 170 Fed. 529, decided that the allotment of a member of the Creek Tribe of Indians was not a new Acquisition, but that it came from the father. Now lawyer who has studied the opinion of the Circuit Court of Appeals of the Eighth

Circuit will deny that it is a Court of Great Ability and no self-respectng lawyer will attempt a criticism of the opinion of that or any other Court except in the most respectful manner, but I believe that, if done with the proper respect which every member of the Bar owes to every respectable Court, any lawyer has the right in a Bar Association to differ from any Court and to point out to his brethren the reason for differing.

In the course of the opinion where this decision was made, Judge Amidon, who delivered the opinion of the Court, said:

"Among the people of Arkansas there was no way of acquiring land except by grant, gift, of inheritance. This was true even of lands acquired from the federal government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a momen'ts thought to see that when this statute was applied to the lands of the Creek Nation it was applied to a subject matter entirely different from that which was in the mind of the legislature of Arkansas. The lands of that tribe fit into neither of the
142 classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as public lands of the United States are held by the Nation. They constitute the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property."

The opinion then argues at some length the question of the status of the allottee toward his land and then says:

"So ling as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue and the division of its property was far more kin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to and allottee is a new right or acquisition created by the allotment. The right to the allotment antedates the allotment and is simply given effect *to* by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parents and not by purchase. In applying the Arkansas statute we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands, not as a new acquisition, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally."

In the case of Eastern Cherokees vs. United States and Cherokee Nation, 117 U. S. 312, 29 Law Ed. 880, the Eastern Band of Cherokees sued for a proportionate part of the funds belonging to the Cherokee Nation, derived from the sale of certain lands, part of which were west of the Mississippi River. The Supreme Court denied the right to recover and among other things said:

"Their claim, however, rests upon no solid foundation. The lands, from the sale of which the proceeds were derived, belonged to
the Cherokee Nation as a political body, and not to its inde-
143 vidual members. They were held, it is true, for the common benefit of all the Cherokees but that does not mean that each member had such an interest as a tenant in common that he could claim a pro rata proportion of the proceeds of sale made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; But that right neither prevented nor qualified the legal power of that authority to dede the lands and the title of the Nation to the United States."

If the Nation as a political body could grant the lands of the tribe, the title of the individual members must have been very slender indeed. A tenant in common cannot have his right divested by a dded to which he is not a party.

In Stephens vs. Cherokee Nation and kindred cases, reported in 174 U. S. 445, Law Ed. 1041, the question of the constitutionality of the Citizenship Court was at issue. It was claimed by persons who had been admitted to citizenship in the various tribes by the United States Court in the Indian Territory that they had thereby obtained vested rights in the lands and moneys of the tribes, of which they could not be divested by a judgment of the Citizenship Court. In refuting this claim Mr. Chief Justice Fuller says:

"But in any aspect, we are of the opinion that the constitutionality of these acts in respect of the determination of the citizenship can not be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

In the case of Journeycake, cited by Judge Amidon in the Shulthis case, Mr. Justice Brewer, speaking of the interest of certain Delaware Indians in the lands of the Cherokees, said (155 U. S. 215, 39 Law Ed. 125):

"That interest being like that of the native Cherokees, limited to a mere occupancy of the tracts set apart for homes, with the right
to free use in common of the unoccupied portion of the
144 reserve, and the right to share in any future allotment."

A fee simple title to land is very different to that of a mere right of occupancy. A title which permits a man to hold his land in severalty and to seal and dispose of it is very different from a right of occupancy, especially when he cannot sell his interest in the land nor alienate it in any way, nor even transfer his right of occupancy except to one of the same tribe.

The case of J. E. Fleming, et al. vs. Green McCurtain, et al. is the celebrated or notorious suit brought by Webster Ballinger on behalf of several thousand persons claiming to be Choctaws and Chickasaws by blood for their share of tribal properties, asking to have a trust declared therein in their favor. Mr. Justice Holmes delivered the opinion of the Court on the 8th of November, A. D. 1909, and after stating the contention of the plaintiffs that the patent of 1842, founded on the treaty of 1830, of the lands described therein, provided that the Choctaw Nation was to have and to hold the same, "to them and their descendants, to inure to them while they shall exist as a Nation and live on it," liable to no transfer or alienation except to the United States, or with their consent, created the Choctaw Nation a trustee for them as descendants of the members of the tribe at the time of the grant, and that as beneficiaries of the trust thus created they could recover, says:

"As we cannot agree with this contention, it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiff's case is upon the words of the treaty and the patent we have set forth. Those words seem to us to convey a different meaning on their face—a meaning that could not be charged, but rather confirmed, if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do."

145 The Court then proceeds to show that the conveyance was to the Nation, as such, and not to individuals.

But the plainest declaration of the status of the individual Indians towards the lands of the tribes is contained in the portion of the Circuit Court of Appeals of the Eighth Circuit, by one of the Judges who took part in the Shulthis case, in the case of Ligon vs. Johnston, 164 Fed. 670. In the case Judge Hook said with reference to the lands of the Choctaw Tribes:

"That the lands involved were public lands, belonging to the Choctaw and Chickasaw Nations and not to the individual members, has been assumed without contradiction from the inception of their titles through a long sequence of acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is only so in the broad comprehensive sense in which the public property of any government is in trust for the welfare of its people. Until specific, private, individual rights attach pursuant to law the enforcement of such trusts must be at the bar of public conscience. They are not justificable by the courts.

As has just been shown by the Fleming case the title was not held in trust in any legal sense of the term.

It would appear, therefore, that the title to the lands of these tribes was in the various tribes as such in their political capacity, prior to the dates fixed by the various treaties at which or as of which, the rolls should be made up.

In the case of Hogan vs. Finley, 52 Ark. 55, it was decided that where a father, desiring to procure the title to certain lands belonging to the State and to give them to his son, procured a donation deed from the State to his minor son and paid the fees and expenses

necessary to obtaining the deed, the title so obtained was a new acquisition in the son, that the father took only a life estate in the lands and that he had no interest in the lands he could devise.
146 To the same effect is the case of Matness vs. Arnold, 31 Ark. 103. These cases, as well as the case of Kelly's heirs in 15 Ark., 555, had been the settled construction of the statute in Arkansas for years before the statute was adopted in the Indian Territory, and, in putting the statute in force in the Indian Territory, Congress undoubtedly intended to extend with it the construction that had been placed on it by the Supreme Court of Arkansas.

"Estate" signifies the condition or relation a man bears to his property, or his interest therein. It seems very clear that a mere right of occupancy, with a bare right to transfer to a member of the same tribe, is not the same estate as a fee simple title with full right of alienation, and the fact that by restrictions the right of alienation is postponed does not change the matter. It would seem that the new title made by the treaty, selection as an allotment and patent, made an entirely new estate in the land and that it was a new acquisition in the person who first received it. It is true, as stated by Judge Amidon, that the decedent received the land by virtue of his blood, but that is a condition of his getting the land and does not signify that he got the title from his father. It was mere evidence of his membership in the tribe and as a matter of fact many persons shared in the tribal lands who were not of Indian blood at all, but derived their rights by intermarriage or by adoption.

Judge Amidon does not claim that the father granted the land to the child, but expressly says that in Arkansas there was no way of acquiring land except by grant, gift or inheritance and then says that the lands of the Indians fit into neither of these classes. There are ways by which title to land can be obtained otherwise than by gift, grant or inheritance—for instance, by prescription or
147 escheat—but no way can be imagined by which a title can pass from father to son except in one of these three ways. The child in the case did not receive it as a gift from the father because the father never had it. He did not receive it by grant for the same reason and he did not get it by inheritance for the same reason and for the further reason that the father was not dead. To say that a man has inherited something implies that some one is dead. No man is heir to the living and in this case the father was living. The Shulthis case says that the land came by inheritance from the father, but to speak of the matter in this language unsettles all the use of terms as settled by the common law. It will be something new in the law of real property if a child can inherit land from the father and the father back from the child and still there be only one funeral in the family.

If the Indians were tenants in common of the tribal lands prior to allotment, then, where a wife died before her allotment was selected and it was selected in her name after her death, other conditions being satisfied, the husband would have taken curtesy under the Arkansas Law, and so as to dower in the allotment of

the Husband. All the Courts that have passed on these questions have held that no curtesy or dower existed and their decision is based on the fact that there was no tenancy in common prior to allotment and that the title created by the allotment was an entirely new estate.

No court of appeal- has decided these questions to my knowledge, but Judge Wm. H. H. Clayton of the Central District of Indian Territory, — is exceedingly well informed upon all Indian questions decided the matter prior to Statehood and I understand that Judge Clark of Oklahoma County has decided the same question in
148 the same way since Statehood. Unless the estate acquired by allotment is a new acquisition these decisions are wrong.

I will state that no matter is better settled under the decisions of Arkansas than that the tenancy in common gives the right of curtesy.

It would seem that the Indians prior to allotment stood in about the same relation to the tribal lands that a citizen of the United States does to the public lands of the United States. To be sure they had the right of occupancy, but the United States could give such right in the public lands to its citizens without conveying a title. The fact that member- of the tribe had occupied the lands gave no right in the lands except a preference in selecting their allotment in the portion upon which they had improvements and that preference was given by the treaty and was created by it.

The father never owned the lands which were allotted to the child and if the child had not been born neither the father nor any other member of the tribe could have owned its allotment. The part selected for the child would have become a part of the surplus unallotted lands of the tribe and at some glad day probably would have been sold and the proceeds, at some more indefinitely postponed time, paid pro rata to the members of the tribe. Neither the father nor other near relative of the trib would have gotten a cent more of the proceeds than a member who was in no way related to the child. The child did not inherit the lands from any person nor did any person give or grant them to the child. Then it must be a new acquisition.

The treaties fixed a day when all members of the tribe then liv-
ing should be entitled to share in the division of the lands,
149 moneys, and other property. The lands were divided between them just as the shareholders of a corporation might agree to dissolve the corporation and divide the property among the shareholders. Each shareholder would hold by a new and different title from that which had formerly existed in the corporation.

The individual allottee claimed title through no other person, but through the political society to which he formerly belonged; just as much as a new one as is created by patent from the United States, conveying some of the public lands to one of its citizens.

With a few notable exceptions, as stated above, the profession was very much surprised at the decision. Of course, the gentlemen who have been buying these Indian titles and taking a lease for five years (which they recorded), a power of attorney irrevocable for

twenty years, a quit claim deed (which they had recorded), and a warranty deed looked very pleasant, said it was what they had always said and went over to the recorder's office and filed their warranty deed for record. But none of them had expected it to the extent of paying anything like full value for the land. They had taken all these instruments under the belief that they were getting only a life estate.

What the final result of the matter will be remains to be seen. A gentleman of considerable prominence has said that a question is never settled until settled right. If the Shulthis decision is not right, will the matter get before the Supreme Court of the United States at an early day? Will our Supreme Court follow it? I will say in passing that I doubt seriously if that appeal will be decided by the Supreme Court. I am inclined to think that it will be dismissed on account of the manner in which the suit is brought.

150 How long will it take the decision to become a rule of property? It may take longer than is ordinarily the case for the reason that the parents have practically all sold, and, while warranty deeds were taken in many instances, all parties had the impression that the parent could only convey a life estate and full value was not paid.

If the Torrens Land System should be enacted into law in the State, as is advocated in some quarters of great influence in state councils, what would the register *to* with a title of the kind involved in the case and what would become of the System if after a few years the Supreme Court of the United States should decide to reverse the decision? These are some of the questions that arise with reference to the matters involved in the case.

Endorsements on the back of said depositions: In the District Court, Tulsa County, Oklahoma. D. A. McDougal, Plaintiff, vs. Edmond McKay, et al., Defendants. Depositions. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10, 1914. W. W. Stuckey, Clerk. Rosser and Cochrane, Attorneys for Plaintiff.

151 In the District Court of Tulsa County, State of Oklahoma.

D. A. McDOUGAL, Plaintiff,

vs.

EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above-styled action that the depositions of Messrs. Guy L. Andrews and Jean P. Day may be taken upon the attached interrogatories before any officer authorized under the laws of the State of Oklahoma to take depositions, and it is agreed that all formalities as to notice of taking and as to form of certificate shall be and are hereby waived, and that the answers to said interrogatories may be

offered in evidence at the trial of the above styled action, subject to objections for irrelevancy, incompetency and immateriality.

Dated this 6th day of March A. D. 1914.

——— ———,
Attorneys for Plaintiff.
RAMSEY & THOMAS,
Attorneys for Defendants.

We waive the propounding of cross interrogatories.
RAMSEY & THOMAS,
Attorneys for Defendants.

152 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Interrogatories to be Propounded to Mr. Guy L. Andrews, Witness for the Plaintiff in the Above-entitled Action.

Int. I. State your name, age, occupation and place of residence.

Int. II. If you answer that you are a practicing lawyer, state how long you have been a member of the bar and how long you have practiced in what is now Oklahoma.

Int. III. At what place or places in Oklahoma or Indian Territory have you practiced law?

Int. IV. State whether these places are located in the Choctaw, Chickasaw, Creek, Cherokee or Seminole Nations.

Int. V. In your practice have you had occasion to examine land titles and to try suits with reference to titles and lands in the Choctaw Nation? Have you had occasion to advise people with reference to the validity of titles in said Nation?

Int. VI. If you answer that you have had occasion to examine the land titles, try cases involving the title of lands in the Choctaw Nation and to advise people with reference to the validity of land titles in said nation, please answer to what extent.

153 Int. VII. Are you familiar with the decision of the Circuit Court of Appeals of the United States for the Eighth Circuit entitled Shulthis vs. McDougal and reported in 170 Fed. 529, 95 C. C. A. 615.

Int. VIII. If you answer that you are familiar with this decision, please state if you can, what was the general opinion of the bar of the Choctaw Nation prior to that decision, as to whether or not the allotments of a member of the Choctaw Tribe of Indians were new acquisitions or ancestral estates.

Int. IX. Since the opinion in Shulthis vs. McDougal referred to

in the preceding interrogatory, what has been your custom or practice with reference to advising clients upon titles where the same question is involved? State whether you have advised them to rely on this decision or to obtain conveyance from collateral heirs.

Int. X. Answer if you know what advice other lawyers in McAlester and in the portion of country where you are acquainted have usually given clients with reference to the validity of titles such as are involved in the Shulthis decision, since that opinion was handed down.

Int. XI. Bearing in mind the acts of April 21, 1904, April 26, 1906, and May 27, 1908, affecting the restriction upon alienation by members of the Five Civilized Tribes, and bearing in mind the fact that the opinion is Shulthis vs. McDougal was rendered June 9, 1909, that it was appealed to the Supreme Court of the United States where it was dismissed for want of jurisdiction May 7, 1912; what would you say was the proportion of titles descending from parents dying without issue leaving their parents, or one of them, surviving that had been purchased and paid for on the theory that the
154 parent owned the fee and what proportion upon the theory that the parent or parents only took a life estate.

ROSSER & COCHRAN,
Attorneys for Plaintiff.

155 In the District Court of Tulsa County, State of Oklahoma.

No. —.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants.

Interrogatories to be Propounded to Mr. Jean P. Day, Witness for the Plaintiff in the Above-entitled Action.

Int. I. State your name, age, occupation and place of residence.

Int. II. If you answer that you are a practicing lawyer, state how long you have been a member of the bar and how long you have practiced in what is now Oklahoma.

Int. III. At what place or places in Oklahoma or Indian Territory have you practiced law?

Int. IV. State whether these places are located in the Choctaw, Cherokee, Chickasaw, Creek or Seminole Nations.

Int. V. What official positions have you held in the State of Oklahoma.

Int. VI. In your practice have you had occasion to examine land titles and to try suits with reference to titles and lands in the Choctaw Nation? Have you had occasion to advise people with reference to the validity of titles in said nation?

Int. VII. If you answer that you have had occasion to examine

land titles, try cases involving the titles of lands in the
156 Choctaw Nation and to advise people with reference to the validity of land titles in said Nation, please answer to what extent.

Int. VIII. Are you familiar with the decision of the Circuit Court of Appeals of the United States for the Eighth Circuit entitled, Shulthis vs. McDougal and reported in 170 Fed. 529, 95 C. C. A. 615?

Int. IX. If you answer that you are familiar with this decision, please state if you can, what was the general opinion of the bar of the Choctaw Nation prior to that decision, as to whether or not the allotments of a member of the Choctaw Tribe of Indians were new acquisitions or ancestral estates.

Int. X. Since the opinion in Shulthis vs. McDougal referred to in the preceding interrogatory, what has been your custom or practice with reference to advising clients upon titles where the same question is involved? State whether you have advised them to rely on this decision or to obtain conveyance from collateral heirs.

Int. XI. Answer if you know what advice other lawyers in McAlester and in the portion of the country where you are acquainted have usually given clients with reference to the validity of titles such as are involved in the Shulthis decision, since that opinion was handed down.

Int. XII. Bearing in mind the acts of April 21, 1904, April 26, 1906, and May 27, 1908, affecting the restriction upon alienation by members of the Five Civilized Tribes, and bearing in mind the fact that the opinion in Shulthis vs. McDougal was rendered June 9, 1909, that it was appealed to the Supreme Court of the United States where it was dismissed for want of jurisdiction May 7, 1912; what would you say was the proportion of titles descending from parents dying without issue leaving their parents, or one of them, surviving, that had been purchased and paid for on the theory that the
157 parent owned the fee and what proportion upon the theory that the parent or parents only took a life estate.

ROSSER & COCHRAN,
Attorneys for Plaintiff.

158 In the District Court of Tulsa County, State of Oklahoma.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Depositions of Witnesses to be Used in the Above-entitled Cause, Taken in the Offices of Andrews & Day, at McAlester, Oklahoma, on the 9th Day of March, 1914.

GUY L. ANDREWS, being first duly sworn, deposes and says:

In answer to Int. No. 1. My name is Guy L. Andrews, I am 42 years of age by occupation a lawyer and reside at McAlester, Oklahoma.

In answer to Int. No. 2. I have been a member of the bar since 1903 and having during all of that time practiced in what is now State of Oklahoma.

In answer to Int. No. 3. I have practiced law in the east side of the State of Oklahoma rather generally, my offices having been either at Wilburton, Oklahoma, or in McAlester, Oklahoma.

In answer to Int. No. 4. My offices have always been located in what was the Choctaw Nation.

In answer to Int. No. 5. In my practice I have had many occasions to examine land titles and quit- frequently to try law suites with reference to titles and lands in the Choctaw Nation, and I have often had occasion to advise people with reference to the validity of titles in the Choctaw Nation.

In answer to Int. No. 6. It would be hard to explicitly answer this question. There has not probably been a month in the
159 last eight years that I have not advised people with reference to the validity of land titles and in the trial of cases I probably have had something in the neighborhood of two or three actual trials per year, and five or six per year where suits would be filed or defended and settlements had without trial.

In answer to Int. No. 7. Yes.

In answer to Int. No. 8. The general opinion of the bar in the Choctaw Nation prior to that decision was that the allotments of a member of the Choctaw Tribe were new acquisitions. I feel quite sure that this belief met the approval of not less than ninety per cent of the members of the bar of the Choctaw Nation.

In answer to Int. No. 9. It has been my practice to wholly disregard the opinion in the case of Shulthis vs. McDougal. I have refused to pass titles and will yet refuse to pass them where this question is involved without conveyances from collateral heirs. During the time that I have been passing upon titles it has frequently occurred that persons holding titles on the theory of either line of descent have been presented to me. In the light of the McDougal case, I have, of course, required that they get conveyances or quit-claims upon the theory of an ancestral estate, but I have invariably required that they likewise obtain the conveyances or quit-claims from all collateral kindred before I would pass the title as good.

In answer to Int. No. 10. I only know what advice other lawyers in McAlester and in this portion of the country are giving from conversations with them and from an investigation of abstracts showing the procedure adopted, with the exception of one man in McAlester in the general practice I do not believe there is any attorney who advises his clients that titles had from the parents are free
160 from such grave doubt as to justify the expenditure of money for the titles. There is one attorney here who adopted that view prior to the Shulthis-McDougal decision and has consistently followed it, other than that so far as I know there has been no change in the policy of any of our lawyers. There are I think about sixty-five lawyers in the practice in McAlester.

In answer to Int. No. 11. It would be hard to say what the proportion of titles were that had been paid for on one or the other theories

I do know that I have been examining extracts for several years for several loan companies, as well as passing on them for prospective purchasers and during that time there has never been but one title that came to our office, attached to which was the written approval of a reputable attorney, that was based solely upon the theory that the land was an ancestral estate and unaccompanied by quit-claim or releases from collateral kindred and there have been a few that I have examined, where attention was called to the Shulthis-McDougal decision, accompanied by the statement to the effect that the holding of the Eighth Circuit was adverse to the view held by the majority of attoeneys in our country, but until such decision was given further effect from the Supreme Court of the United States it was deemed dangerous to accept titles unless not only the parents but collateral kindred joined in the conveyance, or otherwise released their claims. Indeed our Probate Court has sold and received money from minors on the theory that they had some interest, notwithstanding the decision, where the parents or purchaser was anxious to make unquestioned the title to allotments remaining in the hands of the
161 allottee at death. I don't believe that there are now as much as five per cent of the lands in our country that have been purchased from the heirs of decedents where the question was involved that was involved in this case that have purchased or held upon the strength of the rule of descent announced in the Shulthis-McDougal decision.

In the use of the words "lands" or "titles" I mean lands allotted to citizens of the Indian Tribes and titles derived by inheritance from the allottee.

GUY L. ANDREWS.

162 In the District Court of Tulsa County, State of Oklahoma.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Depositions of Witnesses to be Used in the Above-entitled Cause, Taken in the Offices of Andrews & Day, at McAlester, Oklahoma, on the 9th Day of March, 1914.

JEAN P. DAY, being first duly sworn, deposes and says:

Int. No. I. Ans. My name is Jean P. Day, I am forty years old and am engaged in the law practice and reside at McAlester, Oklahoma.

Int. No. II. Ans. I have been a member of the bar for fifteen years and have practiced for the past fourteen years in what is now the State of Oklahoma.

Int. No. III. Ans. At Poteau and McAlester.

Int. No. IV. Ans. Both these places are located in what was formerly the Choctaw Nation, Indian Territory.

Int. No. V. Ans. I was a member of the Code Commission with

Judge S. H. Harris, that revised the present statutes of the State of Oklahoma, commonly referred to as the Harris-Day Code.

Int No. VI. Ans. During the years I have been in the practice at the above named points I have had occasion to examine land titles and try suits with reference to titles in lands in the Choctaw Nation and also to advise people with reference to the validity of titles in said Nation.

Int. No. VII. Ans. The last ten years of my practice has
163 been fairly large and a very considerable portion of that practice has involved litigation upon land titles in the Choctaw Nation and in advising my clients with reference to the validity of land titles in said Nation.

Int. No. VIII. Ans. I am familiar with the decision of the Circuit Court of Appeals of the United States for the Eighth Circuit entitled, Shulthis vs. McDougal and reported in 170 Fed. 529, 95 C. C. A. 615.

Int. No. IX. Ans. Prior to that decision it was the opinion of very large majority of the bar of the Choctaw Nation that the allotments of a member of the Choctaw Tribe of Indians were new acquisitions.

Int. No. X. Ans. I only know what advice other lawyers in McAlester and in this portion of the country are giving from conversations with them and from an investigation of abstracts showing the procedure adopted. With the exception of one man in McAlester in the general practice I do not believe there is any attorney who advises his clients that titles had from the parents is free from such grave doubt as to justify the expenditure of money for the titles. There is one attorney here who adopted that view prior to the Shulthis-McDougal decision and has consistently followed it, other than that so far as I know thare has been no change in the policy of any of our lawyers. There are I think about sixty-five lawyers in the practice in McAlester.

Int. No. XI. Ans. It would be hard to say what the proportion of titles were that had been paid for on one or the — theories. I do know that I have been examining abstracts for several years for several loan companies, as well as passing on them for prospective
164 purchasers and during that time there has never been but one title thet came to our office, attached to which was the written approval of a reputable attorney, that was based solely upon the theory that the land was an ancestral estate and unaccompnied by quit claims or releases from collateral kindred and there have been a few that I have examined, where attention was called to the Shulthis-McDougal decision, accompanied by the statement to the effect that the holding of the Eighth Circuit was adverse to the view held by the majority of attorneys in our country, but until such decision was given further effect from the Supreme Court of the United States it was deemed dangerous to accept titles unless not only the parents but collateral kindred joined in the conveyance, or otherwise released their claims. Indeed our Probate Court has sold and received money from minors on the theory that they had some intherest, notwithstanding the decision, where the parents or purchaser was anxious to

make unquestioned the title to allotments remaining in the hands of the allottee at *its* death. I don't believe that there are now as much as five per cent of the lands in our country that have been purchased from the heirs of decedents where the question was involved that was involved in this case that have purchased or held upon the strength of the rule of descent announced in the Shulthis-McDougal decision.

Int. No. XII. Ans. It would be difficult for me to state since the handing down of the opinion in the case of Shulthis vs. McDougal what proportion of titles descending from parents dying without issue leaving their parents, or one of them, surviving, that had been purchased and paid for on the theory that the parent owned the fee and that the parent or parents only took a life estate. My observation has been, and my judgment is, that since that date a large majority of conveyances made have been such as the title would be good upon both theories of the law.

In the use of the words "lands" or "titles" I mean lands allotted to citizens of the Indian Tribes and titles derived by inheritance from the allottee.

JEAN P. DAY.

Certificate.

I, Jackman A. Gill, a Notary Public within and for the County of Pittsburg, State of Oklahoma, hereby certify that the above named Guy L. Andrews and Jean P. Day, witnesses whose names are severally subscribed to the foregoing depositions were by me first duly sworn to testify the truth, the whole truth and nothing but the truth in the case aforesaid, and the depositions by them respectively subscribed were taken in shorthand and transcribed by Laura P. Mullins a disinterested and proper person and were subscribed by the respective witnesses in my presence and the same were taken on the 9th day of March, 1914, between the hours of eight o'clock A. M. and six o'clock P. M. of said day in the offices of Andrews & Day, in the town of McAlester, in the County of Pittsburg in the State of Oklahoma. That neither I, nor the said Laura P. Mullins, am an attorney for or related to either of said parties or otherwise interested in the event of said action.

[SEAL.] JACKSON A. GILL,
Notary Public.

My commission expires the 23 day of September, 1917.

Endorsements: District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10 1914. W. W. Stuckey, Clerk.

STATE OF OKLAHOMA,
County of Tulsa, ss:

I, Jo. D. Payne, Official Reporter of the District Court within and for the County of Tulsa, State of Oklahoma, do hereby certify that the above and foregoing is a full, true, correct and complete copy

and transcript of all the evidence offered or introduced on the trial of the above entitled cause.

JO. D. PAYNE,
Official Reporter.

168 And thereupon, on the same day, to wit, the 10th day of March A. D. 1914, the following judgment was entered in this cause.

169 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDougal, Plaintiff,
vs.
Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis, Defendants.

Journal Entry.

On this 10th day of March, A. D. 1914, came on to be heard the above entitled and number-cause ;and the plaintiff D. A. McDougal, appeared in person and by his attorneys, Messers. Rosser & Cochran and L. O. Lytle, Esq.; and the defendants, Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, appeared in person and by their attorneys, Messrs. Ramsey & Thomas, and all parties announced ready for trial and thereupon the Court heard the cause upon the petition and the exhibits thereto, the answer, the statement of counsel, the agreed statement of facts filed in the cause and the evidence offered.

And after hearing the cause and being well and sufficiently advised the Court finds that Andrew J. Berryhill, deceased, was a member by blood of the Creek Tribe of Indians; that the said Andrew J. Berryhill died in the month of November, 1901, intestate and unmarried leavin*t* no brothers, sisters or children surviving him; that he left surviving him his father, George Franklin Berryhill, and his mother, Clementine Berryhill, and the following uncles and aunts, to-wit; Martha E. Lee Kiefer. Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and
170 Josie Morton; that thereafter on or about the 8th day of October, A. D. 1902, the name of said Andrew J. Berryhill was duly placed on the tribal rolls of the Creek Nation as a citizen and member thereof, by the Commission to the Five Civilized Tribes and that afterwards on or about the 14th day of November, A. D. 1902, his enrollment was approved by the Secretary of the Interior; that afterwards in the year 1904 the lands in contro*b*ersy in this suit were set apart and allotted to the heirs of Andrew J. Berryhill, deceased, and that a patent therefor was afterwards issued; that afterwards on the 5th day of June, 1906, George Franklin Berryhill and Clementine Berryhill, father and mother of the said Andrew J. Berry-

hill, executed and delivered to the defendants, Edmond and Perry McKay, a warranty deed conveying the lands in controversy unto the said Edmond and Perry McKay and that afterwards on the 9th day of August, 1910, the said Edmond McKay and Perry McKay conveyed to the defendant, John V. McKay, an undivided one-third interest in said lands; that afterwards and subsequent to August 8th, 1907, the plaintiff D. A. McDougal, obtained conveyances in the form of warranty deeds from Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, the said uncles and aunts of Andrew J. Berryhill, deceased, purporting to convey the fee simple in said lands to the said D. A. McDougal subject to the life estate of the said George Franklin Berryhill, the father of the said Andrew J. Berryhill, deceased, and that said deeds were in the form as attached to said petition as exhibits. And the Court finds that the defendant Albert W. Shulthis, is in possession of said lands and that he is operating the same for oil and gas under a contract and agreement with the defendants, Edmond McKay, Perry McKay and John W. McKay.

171 And the Court finds that the said George Franklin Berryhill and Clementine Berryhill were the owners of said lands in fee simple as heirs of the said Andrew J. Berryhill, deceased, and that the said uncles and aunts of the said Andrew J. Berryhill were never the owners of any interest, right and title in said lands whatever and that their deeds to the plaintiff did not convey any right, title or interest *of* said plaintiff or vest in him any interest in said lands.

It is therefore considered, ordered, adjudged and decreed by the Court that the plaintiff, D. A. McDougal, take nothing by this action and that this petition be dismissed; and that the defendants have and recover of and from the said plaintiff, D. A. McDougal, all their costs in this behalf expended, to which judgment and order of the Court the plaintiff excepts.

And now on this 10th day of March, A. D. 1914, comes the plaintiff and files his motion for a new trial herein and the Court after hearing the motion and being well and sufficiently advised overrules said motion, to which action of the Court in overruling said motion, the plaintiff excepts.

And thereupon the plaintiff prays an appeal to the Supreme Court of the State of Oklahoma and it is ordered that the time for making and serving a case be and it is hereby extended for a period of forty days from this date, and it is further ordered that defendant be allowed ten days thereafter in which to suggest amendments and that the case made be settled and signed upon five days' notice by either party.

L. M. POE, *Judge.*

172 And thereupon, on the same day, towit, the 10th day of March, 1914, there was filed the motion of the plaintiff for a new trial, which motion is in the words and figures following, to-wit:

173 In the District Court in and for Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Motion for New Trial.

Comes now the above named plaintiff and moves the court to set aside, vacate and hold for naught the decision and judgment rendered in the above styled cause on the 10th day of March, 1914, for the following reasons and upon the following grounds, to-wit:

First. That there was an abuse of discretion on the part of the Court trying said cause by reason of its failure and refusal to allow your plaintiff to show that the cause in the Federal Court known as Shulthis vs. McDougal had not become a rule of property in the State of Oklahoma.

Second. That material error of law occurred at the trial of this cause and was duly excepted to by the party making this application, to-wit, your plaintiff.

Third. The judgment and decision of the Court is not sustained by sufficient evidence and the judgment and decision of the Court is contrary to law.

Wherefore, your plaintiff prays the Court that for the reasons and grounds above stated said judgment and decision be set aside, vacated and held for naught, and your plaintiff will ever pray.

L. O. LYTLE,
ROSSER & COCHRANE,
Attorneys for Plaintiff.

174 On the back of which Motion of the Plaintiff for a new trial appear the following endorsements: No. 3528. D. A. McDougal vs. Edmond McKay, et al. Motion for New Trial. District Court, State of Oklahoma, County of Tulsa. Filed Mar. 10, 1914. W. W. Stuckey, Clerk.

175 The above and foregoing is a full, true, correct and complete copy and transcript of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments in said cause, including all the orders and rulings made, all of the exceptions allowed, all of the evidence offered or introduced, and all of the record upon which the judgment and journal entry in said cause were made.

176 In the District Court in and for Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Acceptance of Service.

We, the undersigned, attorneys of record for the defendants in the above entitled cause, do hereby certify that the foregoing case made was duly served on us on this 6th day of April, 1914.

GEO. S. RAMSEY,
C. L. THOMAS,
Attorneys for Defendants.

177 In the District Court in and for Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Stipulation of Attorneys.

It is hereby stipulated and agreed by and between the parties hereto that the foregoing case made contains a full, true, correct and complete copy and transcript of all the proceedings in said cause, including all pleadings filed and proceedings had, all of the evidence offered and introduced, all the orders and rulings made and exceptions allowed, and all of the record upon which the judgment and journal entry in said cause were made; and the same is a full, true, correct and complete case made; and the said defendants waive the right to suggest amendments to said case made and hereby consent that the same may be settled immediately and without notice, and hereby join in the request of the plaintiff that the Judge of said Court settle the same and order the same certified by the Clerk of the District Court and filed according to law; and said defendants hereby waive the issuance and service of summons in error from the Supreme Court of the State of Oklahoma.

MALCHON E. ROSSER,
WILLIAM S. COCHRAN,
Attorneys for Plaintiffs.
GEO. S. RAMSEY,
C. L. THOMAS,
Attorneys for Defendants.

Filed May 5th, 1914. W. H. L. Campbell, Clerk.

178 In the District Court of Tulsa County, Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Notice of Settlement of Case Made.

To the Attorneys for said Defendants:

You are hereby notified that on the — day of ——, 1914, at — o'clock — M., or as soon thereafter as counsel can be heard, the case made in said cause, with the amendments heretofore suggested by you, will be presented to the Honorable L. M. Poe at his chambers in the city of Tulsa for settlement.

—— ——,
—— ——,
Attorneys for Plaintiff.

Service of the above notice is hereby accepted this the 7th day of April, 1914.

GEO. S. RAMSEY,
C. L. THOMAS,
Attorneys for Defendants.

179 In the District Court in & for Tulsa County, State of Oklahoma.

No. 3528.

D. A. McDOUGAL, Plaintiff,
vs.
EDMOND McKAY et al., Defendants.

Certificate of Trial Judge.

This is to certify that the foregoing case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the Clerk of the District Court attest the same with the seal of said Court and file the same of record.

Witness my hand at Tulsa, Oklahoma, this 8th day of April 1914.
L. M. POE, *Judge.*

Attest:
W. W. STUCKEY,
Clerk of the District Court,
[SEAL.] By J. A. LASWELL, *Deputy.*

Endorsed: District Court, State of Oklahoma, County of Tulsa. Filed Apr. 8, 1914. W. W. Stuckey, Clerk.

180 Supreme Court, April Term, 1914, June 2nd, 1914, Fifteenth Judicial Day.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
EDMOND McKAY et al., Defendants in Error.

And now on this day it is ordered by the court that the above cause be advanced and set for hearing at the July 1914 term of court as per motion filed herein on May 22, 1914.

181 Supreme Court, July Term, 1914, July 18th, 1914, Fifth Judicial Day.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
JOHN V. McKAY et al., Defendants in Error.

And now on this day the above cause is submitted on the record and briefs filed herein.

182 Supreme Court, July Term, 1914, August 25th, 1914, Twelfth Judicial Day.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
EDMOND McKAY et al., Defendants in Error.

And now this cause comes on for final decision and determination by the court upon the record and briefs filed herein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed. Opinion by Riddle, J.

All the Justices concur.

183 (Filed Aug. 25, 1914. W. H. L. Campbell, Clerk.)

In the Supreme Court of the State of Oklahoma.

No. 6372.

D. A. McDOUGAL, Plaintiff in Error,
vs.
EDMOND McKAY, PERRY McKAY, JOHN V. McKAY, and ALBERT W. SHULTHIS, Defendants in Error.

Syllabus.

1. Andrew Berryhill was a mixed-blood member of the Creek tribe of Indians. He died while an infant, intestate, in November, 1901. Thereafter, his name was duly placed upon the rolls prepared by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior. The land involved and other lands were selected by an administrator and set apart to him as an allotment. Patent was duly issued, conveying the land to his heirs. He left surviving his father, who was a mixed-blood member of the Creek tribe of Indians, and his mother, who was a non-citizen and not a member of any Indian tribe, together with several uncles and aunts, members of the Creek tribe. Held: That under Mansfield's Digest, chap. 49, sec. 2531, which was in force in the Indian Territory by virtue of an act of Congress, that the land involved was not a new acquisition, but came to him by the blood of his tribal parent, to-wit: his father, in whom the fee simple title to said land passed. (Following Shulthis v. McDougal, 170 Fed. 529; Pigeon et al. v. Buck et al., 38 Okl. 101.)
2. The plaintiff in error tendered certain testimony of lawyers, for the purpose of showing that the rule laid down by the Circuit Court of Appeals in the case of Shulthis v. McDougal, 170 Fed. 529, and the case of Pigeon et al. v. Buck et al., 38 Okl. 101, had not been followed generally by the profession and trial judges. Objection was made to the introduction of this testimony, upon the ground that it was incompetent and immaterial, which objection was by the court sustained. Held: That the court committed no prejudicial error in sustaining said objection. Held, further, that the rule announced in the case of Pigeon et al. v. Buck et al., supra, is adhered to and held to be a rule of property.

Error from the District Court of Tulsa County.

L. M. Poe, Trial Judge.

Affirmed.

Rosser & Cochran, Attorneys for Plaintiff in Error.
Ramsey & Thomas, Attorneys for Defendants in Error.

184 *Opinion of the Court by*

RIDDLE, *J.:*

The admitted facts in this case are, that Andrew J. Berryhill was a member by mixed-blood of the Creek Tribe of Indians; that he died intestate, while an infant, in the month of November, 1901, leaving surviving him his father, George Franklin Berryhill, and his mother, Clementine Berryhill; that George Franklin Berryhill was a member, by mixed-blood, of the Creek Tribe of Indians, and legally enrolled; that, his wife, mother of the deceased, Clementine Berryhill, was a non-citizen and not a member of any tribe of Indians; that Andrew J. Berryhill left no brothers or sisters surviving him; that on the 8th day of October, 1902, his name was duly and legally placed upon the tribal rolls of the Creek Nation as a member and citizen thereof by the Commission to the Five Civilized Tribes, and approved by the Secretary of the Interior; that in the year 1904, there was set apart and allotted in the name of the said Andrew J. Berryhill, deceased, the lands involved in this suit with other lands; that in October, 1905, patents were duly issued, conveying the title to said land to the heirs of the said Andrew J. Berryhill, deceased; that on the 5th day of June, 1909, George Franklin Berryhill and wife, Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, for a valuable consideration, executed and delivered to defendants, Edmond McKay and Perry McKay, a warranty deed, conveying all their title and interest in and to the lands involved herein; that thereafter, the said Edmond and Perry McKay conveyed their undivided one-third interest in said lands to John V. McKay; that Andrew J. Berryhill left surviving him the following uncles and aunts: Martha Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, Mary Kiefer and Josie Morton; that subsequent to August 8, 1907, the plaintiff, D. A. McDougal, received a conveyance from each and all of said uncles and aunts named herein, conveying to him whatever interest they each had, if any, in and to said land; that the defendant, Albert W. Shul-
185 this, is in possession of said land under a lease contract made by the defendants, McKays, conveying to him the oil and mineral; and that he is operating and taking the oil from said land under said lease contract.

The plaintiff filed this suit in the district court of Tulsa county to recover the lands in question, claiming to be the owner of the fee simple title, by virtue of his several conveyances received from the uncles and aunts of Andrew J. Berryhill, deceased, and for an accounting for the value of the oil and gas taken therefrom; for the appointment of a receiver and to have his title to the lands quieted, subject to the life estate alleged to be owned by the McKays.

The principal question raised in this appeal is as to whether the title to the lands involved is an ancestral estate, or a new acquisition. The plaintiff contends that under the laws of Arkansas, which were in force in the Indian Territory and made applicable to the Creek

Nation by virtue of an act of Congress, the lands involved were a new acquisition, and hence the father of Andrew J. Berryhill, deceased, took only a life estate. On the other hand, the defendants contend that under the decision by the United States Circuit Court of Appeals for the Eighth Circuit in the case of Shulthis v. McDougal, 170 Fed. 529, and upon the authority of the decision of this court in Pigeon v. Buck, 38 Okl. 101, the title to the lands of a Creek citizen who died intestate, unmarried and without issue, ascended in fee simple to the parent or parents who were of the tribal blood of the intestate, and that in the present instance the lands involved and which were a part of the allotment of Andrew J. Berryhill, deceased, passed to his father.

This court in the case of Pigeon et al. v. Buck et al., supra, following the rule laid down by the Circuit Court of Appeals, said:

"That the land in question was not a new acquisition, and pursuant to these sections, when construed together, passed to John Pigeon and Mate Pigeon, the father and mother of the deceased, is no longer an open question in this jurisdiction, having in effect been decided by the Circuit Court of Appeals for the Eighth Cir-
186 cuit in Shulthis v. McDougal, 170 Fed. 529, 95 C. C. A., 615. There Andrew J. Berryhill, son of George Franklin Berryhill, a member of the Creek Nation of mixed blood, and Clementine Berryhill, his wife, a non-citizen of that tribe, died seized of an allotment. In determining who took the estate, the court construed these two sections together and held the person to be George Franklin Berryhill, the father of the deceased."

And, in concluding the opinion, the court further said:

"We hold that John Pigeon and Mate Pigeon, his wife, are the persons to whom, on the death of the allottee, this estate passed in equal moieties, and that plaintiffs in error, plaintiffs below, have no interest therein."

It cannot be questioned that the decisions of the Federal court construing the acts of Congress relating to the allotment, alienation, etc., of lands belonging to the members of the Five Civilized Tribes are conclusive upon the state courts. The decision of the Circuit Court of Appeals in the case of Shulthis v. McDougal, supra, in the absence of an expression from the Supreme Court of the United States, should be followed by this court on all questions involving the construction of the Federal statutes and allotment acts relating to the members of the Five Civilized Tribes. The question raised here by this appeal was directly involved in the case of Schulthis v. McDougal, supra, and directly adjudicated by the Circuit Court of Appeals, and that decision has been adhered to by this court in the case of Pigeon et al. v. Buck et al., supra; and whatever may be our individual views as to the soundness of these decisions, we are not at liberty to disregard them, but feel constrained to follow the rule laid down therein.

It is further contended by plaintiff that the trial court erred in excluding certain testimony of lawyers tending to show that the rule laid down in the case of Shulthis v. McDougal, supra, was not followed, either by the legal profession or generally by the trial courts.

The purpose of tendering this evidence was to show that the rule announced by the Circuit Court of Appeals in the case of Shulthis v. McDougal, supra, had not become a rule of property in this state. Objection was made to the introduction of this evidence, upon the ground that it was incompetent and immaterial; which ob-
187 jection was by the court sustained. We are now called upon to hold that this ruling of the court was error. Generally, a question of this nature is one of law for the court, and not of fact; and the courts will usually take judicial knowledge as to whether or not a rule announced by the court is of such character, general standing and application as to become a rule of property. The decision in the case of Shulthis v. McDougal was rendered by the Circuit Court of Appeals in 1899 and became final and has been in force in this jurisdiction for several years; and about a year before the present case was tried, this court had followed the rule laid down by the Circuit Court of Appeals in the case referred to, and held that the rule announced had become a rule of property. Owing to the fact that the decision of the Circuit Court of Appeals, in the absence of a final decision by the Supreme Court of the United States, is controlling in this State, when applied to the allotment and alienation of lands of the Five Civilized Tribes, and the further fact that this court in an opinion which has been in force over a year has followed the rule laid down by the Circuit Court of Appeals, and has held the same to be a rule of property, we are of the opinion that the court committed no error in excluding this evidence.

Discussing this question, Vol. 11, p. 755, Cyc. states the rule to be:

"Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of stare decisis to adhere to such decisions without regard to how it might be inclined to decide if the question were new. And this rule obtains, although the court may be of the belief that such decisions are founded upon an erroneous principle and are not sound, for when parties have acted upon such decisions as settled law and rights have been vested thereunder, their inherent correctness or incorrectness in the abstract are of less importance than that the rule of property so established should be constant and invariable."

Mr. Justice Greer, speaking for the Supreme Court of the United States, in the case of Minnesota Company v. National Company, 3 Wall, 332, stated:

188 "Where questions arise which affect titles to land, it is of great importance to the public that when they are once decided, they should no longer be considered open. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only; but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubt-

ful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the *administrators* of it is changed. Courts ought not to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments."

The basis upon which the rule rests is not so much the actual condition existing as a matter of fact, but when a decision of the highest court in any jurisdiction has settled a question of this nature which may affect titles to property, it is conclusively presumed that parties have relied upon such decision as-being the law when purchasing and selling property. While we are aware of the fact that a large per cent of the lawyers in the eastern side of this State were of the opinion that the titles to land similar to the title in question were a new acquisition, yet it may be conceded that the statute was subject to the construction placed thereon by the Circuit Court of Appeals, and that no great principle of law was disregarded in establishing the rule laid down by that court. While prior to the decision of this court in Pigeon et al. v. Buck et al., supra, following the rule laid down by the Circuit Court of Appeals, the lawyers and the courts generally may not have followed the decision of the Circuit Court of Appeals implicitly, yet if only a very small per cent of the people investing money in lands of this character did so upon the strength of the rule announced by that court and as followed by this court, their titles should not be disturbed by a decision at this time holding that the land in question was a new acquisition. Such decision might disturb vested rights and bring into question many titles, which should be avoided, if possible.

We are therefore of the opinion that the court did not err
189 in rejecting the evidence offered, and we still adhere to the rule laid down by this court in the case of Pigeon et al. v. Buck et al., supra, following the decision of the Circuit Court of Appeals, and we reiterate that the same has become a rule of property in this jurisdiction.

Finding no prejudicial error in the proceedings and judgment of the trial court, the same is affirmed.

All the Justices concur.

190 Supreme Court of the State of Oklahoma.

I, W. H. L. Campbell, Clerk of the Supreme Court of the State of Oklahoma, do hereby certify that the foregoing 189 pages numbered from one to 189, inclusive, are a true and complete transcript of the record and all proceedings in said Supreme Court in the case of Daniel A. McDougal, Plaintiff in Error, vs. Edmond McKay, Perry McKay, John V. McKay and Albert W. Shulthis, Defendants in Error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the

seal of said Supreme Court, at Oklahoma City, Okla., this 20th day of October, A. D. 1914.

[Seal Supreme Court, State of Oklahoma.]

W. H. L. CAMPBELL,
Clerk of the Supreme Court of Oklahoma,
By JESSIE PARDOE, *Deputy.*

Endorsed on cover: File No. 24,420. Oklahoma Supreme Court. Term No. 676. Daniel A. McDougal, plaintiff in error, vs. Edmond McKay, Perry McKay, John V. McKay, and Albert W. Shulthis. Filed October 30th, 1914. File No. 24,420.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. . . . .

DANIEL A. McDOUGAL, - - *Plaintiff in Error,*

vs.

EDMOND McKAY, JOHN V. McKAY, PERRY McKAY and ALBERT W. SHULTHIS,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

MOTION TO ADVANCE CASE.

Comes now Daniel A. McDougal, plaintiff in error in the above styled case, and moves the court to advance said case and to set the same for hearing at the same time as the case of *Lena Pigeon, et al., against William Buck et al.*, running No. 23754 and No. 199 of the Docket of the October, 1914, term of this court. And as grounds of said

motion states that the sole question presented in said case of *Pigeon et al. against Buck et al.,* is whether the allotment of lands of a citizen of the Creek Nation is an ancestral estate or a new acquisition within the meaning of Section 2531 of Mansfield's Digest of the Statutes of Arkansas, which was in force in the Indian Territory at the time the descent was cast as to the land involved in said action, construed in connection with Section 2522 of said Mansfield's Digest of said Statutes of Arkansas, and especially in connection with subsection 2 of said section 2522. That said section 2531 is as follows:

> "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

That said section 2522 of Mansfield's Digest is as follows:

> "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be dis-

tributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother, if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestors, and their children and their descendants, in equal parts."

That it was decided by the Supreme Court of the State of Oklahoma in said case of *Pigeon* v. *Buck* (38 Okla. 101, 131 Pac. 1083), that the allotment of a Creek citizen was an ancestral estate and not a new acquisition, and that upon the death of an allottee of the Creek Nation without issue the parent or parents of said allottee of Creek blood, inherited the fee to said allotment to the exclusion of the brothers and sisters of said allottee. That it was also decided in said case that the decision by the Circuit Court of Appeals of the Eighth Circuit in the case of *Shulthis* v. *McDougal,* reported in 170 Fed. 599; 95 C. C. A. 615, in which the same question had been decided in the same way had become a rule of property.

That this case of *McDougal against McKay* involves the same question as was involved in *Pigeon* v. *Buck*. That the principal question involved in this case is whether the allotment of a Creek Indian is a new acquisition or an ancestral estate within the meaning of Sections 2531 and 2522 of Mansfield's Digest of the Statutes of Arkansas quoted above. That it is contended by the appellant herein, Daniel A. McDougal, just as is contended by the appellant in *Pigeon* v. *Buck*, that the estate of an allottee of lands in the Creek Nation is a new acquisition and not an ancestral estate. That in this case also the appellant undertook to prove and offered what he considered material and competent evidence to show that the case of *Shulthis* v. *McDougal had never become a rule of property* in the State of Oklahoma, and that most allotments concerning which this question could arise had been sold and bought on the supposition and theory that they were new acquisitions in the allottee and not ancestral estates; that a very large majority of transfers of allotments concerning which this question could arise were made in the belief by the grantor and grantee that the estates of allottees were new acquisitions and not ancestral estates, and that the Supreme Court of the State of Oklahoma erred in holding that the rule announced in *Shulthis* v. *McDougal* had become a rule of property. That the evidence so offered was excluded by the courts of the state, but that it is in the record in this case, and as this

appellant believes should be read by this court before passing on any of the cases now before this court in which this question is involved. That the evidence is, as this appellant believes, admissible, and is conclusive that the rule announced in *Shulthis* v. *McDougal*, 170 Fed. 529; 95 C. C. A. 615, never became a rule of property in the Indian Territory of Oklahoma.

The appellant believes he will be able to convince the court that the decision in *Shulthis* v. *McDougal* never became a rule of property in Oklahoma and believes that he should have the opportunity to present this matter before the court decides any case involving the question as to whether allotments are ancestral estates or new acquisitions.

Wherefore, ~~Appellant~~ Plaintiff in error prays that this case be advanced and set for hearing on the same day as the case of *Pigeon* v. *Buck*.

MALCOLM E. ROSSER,

Attorney for ~~*Appellant*~~ *Plaintiff in Error, Daniel A. McDougal.*

Service accepted and as counsel for defendants in error, we consent to advance.

Geo. S. Ramsey
Edgar A. de Meules
Attys.

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In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF.

This case is brought here by writ of error from the Supreme Court of the State of Oklahoma. It had the same title in that court. The subject matter involved is the ownership of certain lands in the Creek Nation which constituted part of the allotment of Andrew J. Berryhill, described as follows, to-wit:

> The East Half (E/2) of the North-west Quarter (NW/4) of the North-east Quarter (NE/4) and the South-west (SW/4) of the North-west Quarter (NW/4) of the North-east (NE/4) quarter of Section Thirteen (13) Township Seventeen (17) North, Range Twelve (12) East, containing Thirty (30) acres, more or less, according to the United States survey thereof.

STATEMENT.

The facts are that in the month of May, A. D. 1901, a child named Andrew J. Berryhill was born to George Franklin Berryhill and Clementine Berryhill, husband and wife. George Franklin Berryhill was a member of the Creek tribe of Indians by blood and a duly enrolled citizen, and his name appears upon the roll as a mixed blood, not a full-blood. The mother of the said Andrew J. Berryhill, Clementine Berryhill, was not of Creek blood and was not, and is not, a citizen of the Creek Nation. Andrew J. Berryhill died in the month of November, 1901, intestate and unmarried, leaving no brothers or sisters surviving him. Afterwards, on the 8th day of October, A. D. 1902, his name was placed upon the tribal rolls of the Creek Nation as a citizen thereof, by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 13, 1902. Afterwards, on the 28th day of April, A. D. 1904, the Commission to the Five Civilized Tribes set apart and allotted to him the land in controversy in this action, and, on, or about the 10th day of October, 1905, the Creek Nation and the United States of America, through their legal representatives, executed a patent to said lands conveying the title in and to said lands to the heirs of Andrew J. Berryhill, deceased.

On the 5th day of June, 1906, the said George Franklin Berryhill and Clementine Berryhill, father and mother of the said Andrew J. Berryhill, deceased, executed and delivered to the defendants in error, Edmond McKay and Perry McKay, a warranty deed by which they granted and conveyed to the defendants in error, Edmond McKay and Perry McKay, all their right, title and interest in and to the lands in controversy. Afterwards, on the 9th day of August, A. D. 1910, the said Edmond McKay and Perry McKay, joined by their wives, executed and delivered to the defendant in error, John V. McKay, a deed to an undivided one-third interest in the lands in controversy in this action. Andrew J. Berryhill left surviving him the following uncles and aunts, to-wit: Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton. Afterwards, and subsequent to August 8th, 1907, the plaintiff in error, Daniel A. McDougal, purchased from each and all of said uncles and aunts their right, title and interest in and to the lands in controversy in this action, and each and all of said uncles and aunts executed and delivered to Daniel A. McDougal warranty deeds for said lands conveying and vesting in the said Daniel A. McDougal the fee in and to said lands, subject to a life estate in the father, George Franklin Berryhill. The deed from Martha E. Lee Kiefer is dated August 20th, 1907. The deed from Stanford Berryhill is dated

August 16th, 1907. The deed from Columbus Berryhill is dated August 1st, 1907. The deed from Theodore Berryhill is dated August 15th, 1907. The deed from William Berryhill is dated August 16th, 1907. The deed from Mary Kiefer is dated August 16th, 1907. The deed from Josie Morton is dated August 20th, 1907. Copies of these deeds appear in the record. As no objection was made to their sufficiency in form or to the manner of their execution, it is not considered necessary to refer to them in greater detail in this statement. The defendant in error, Albert W. Shulthis, is the holder of a purported oil lease from the McKays. The validity of the lease depends upon the title of the McKays. If they own the fee simple, he has a good title; otherwise, not.

The facts as stated here were alleged in detail in the petition of the plaintiff in error and were admitted by the answers of the defendants in error. The petition also set forth in detail the various statutes and treaties under which plaintiff in error claims title. At the time this suit was brought in the District Court of Tulsa County, Oklahoma, there was a suit pending in the United States District Court for the Eastern District of Oklahoma, brought by John V. McKay, as a non-resident of the State of Oklahoma, against the plaintiff in error, Daniel A. McDougal, to quiet the title of the said John V. McKay to an undivided one-third interest in the lands in controversy, and the said John V. McKay, for his

parate answer in this case adopted the answer of e other defendants and also set forth the pendency his action in the Federal Court.

The principal matter submitted to the trial rt, as well as the Supreme Court of the State of lahoma, was whether George Franklin Berryhill, herited the fee simple through his son, Andrew J. rryhill, or whether he only inherited a life es-e.

At the trial of the case in the District Court of lsa County, the plaintiff in error, offered to prove the evidence of a number of witnesses, who were acticing lawyers of the State of Oklahoma, in good nding, that the decision of the Circuit Court of peals in the case of *Shulthis* v. *McDougal,* 170 d. 529, had not been considered by the bar of the ate of Oklahoma as settling the question involved ere, and had not established a rule of property th reference to that question in the State of Okla-ma. All of this evidence was excluded and its ex-usion was excepted to by the plaintiff in error. here was a judgment for the defendants in error d the plaintiff in error appealed to the Supreme urt of the State of Oklahoma where the judgment the trial court was affirmed and the writ of error this case was sued out to this court.

The judgment rendered in the trial court was on the pleadings. The defendants admitted all e material allegations of plaintiff's petition. No idence was considered. Certain evidence was of-

fered that will be referred to later but the principal facts were admitted by the answer.

The principal question in the case involves the construction of the statute of descents and distributions of the statutes of Arkansas as contained in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas put in force in the Indian Territory. It was contended by the plaintiff in error, Daniel A. McDougal, that under the provisions of that chapter and especially under the provisions of Section 2531 of said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, George Franklin Berryhill, the father of Andrew J. Berryhill, only inherited a life estate from his deceased son, and that he did not inherit the fee simple title, and that the uncles and aunts, grantors of the plaintiff in error, inherited the fee simple in the land, subject to the life estate in George Franklin Berryhill, the father of the deceased allottee, Andrew J. Berryhill.

ASSIGNMENT of ERRORS.

Plaintiff in error filed the following as his assignment of errors:

1. The Supreme Court of the State of Oklahoma erred in affirming the judgment of the District Court of Tulsa County.

2. The Supreme Court of the State of Oklahoma erred in holding and deciding that under Mansfield's Digest of the Laws of Arkansas, and particularly Chapter forty-nine thereof, the allotment of Andrew J. Berryhill was an ancestral estate and not a new acquisition.

3. The Supreme Court of the State of Oklahoma erred in holding and deciding that the father of Andrew J. Berryhill, deceased, inherited the fee simple in the lands of said Andrew J. Berryhill, deceased, upon his death, to the exclusion of the collateral kindred of said Andrew J. Berryhill.

4. The Supreme Court of the State of Oklahoma erred in holding and deciding that the various grantors of the plaintiff in error who were the uncles and aunts of the said Andrew J. Berryhill, deceased, did not inherit the fee simple estate in his allotment upon his death, and that plaintiff in error acquired no interest in said lands under and by virtue of his deeds from them.

5. The Supreme Court of the State of Oklahoma erred in holding and deciding that the testimony of lawyers to the effect that the decision of the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, had not been followed or acquiesced in by the bar of the state or by the *nisi prius* judges, was not admissible in evidence.

6. The Supreme Court of the State of Oklahoma erred in holding and deciding that the decision in the case of *Shulthis* v. *McDougal,* 170 Fed. 529; and *Pigeon* v. *Buck,* 38 Okla. 101, had become a rule of property.

SPECIFICATION *of* ERRORS.

The plaintiff in error believes that the Supreme Court of the State of Oklahoma erred:

1. In holding that the allotment of Andrew J. Berryhill, deceased, was an ancestral estate and not a new acquisition.

2. In holding that the father of Andrew J. Berryhill, deceased, inherited the fee simple in the lands of said Andrew J. Berryhill, to the exclusion of the collateral kindred of the said Andrew J. Berryhill.

3. In holding that the uncles and aunts of the said Andrew J. Berryhill did not inherit the fee simple estate in his allotment.

4. In holding that the testimony offered to the effect that the decision of the Circuit Court of Appeals in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, had not been followed or acquiesced in by the bar of the state, nor by the *nisi prius* judges, was not admissible.

5. In holding that the decisions in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, and *Pigeon* v. *Buck,* 38 Okla. 101, had become a rule of property.

ARGUMENT.

Specifications One, Two and Three.

The first three specifications all depend upon whether the allotment was a new acquisition or an ancestral estate and will be presented together under the following heads:

1. The Arkansas Statutes and the construction thereof in Arkansas and Indian Territory.
2. The land was a new acquisition in Andrew J. Berryhill and not an ancestral estate.
3. Citizenship in the Creek Nation was not a property right.
4. The lands of the Creek Nation prior to allotment belonged to the Creek Nation as a political body and not to the individual members of the tribe.

The Arkansas Statutes and the Construction Thereof in Arkansas and Indian Territory.

If the allotment of Andrew J. Berryhill was a new acquisition in him, then it follows that the uncles and aunts, who were the collateral kindred, inherited the fee simple in the lands and the father only inherited a life estate. It is the contention of the plaintiff in error that under the undisputed facts in this case the uncles and aunts of the deceased Andrew J. Berryhill became the owners in fee sim-

ple in the land subject to the life estate in the father. This contention is based on the construction of Section 2531 of Mansfield's Digest of the Statutes of Arkansas, which is contained in Chapter forty-nine of Mansfield's Digest. So much of Chapter forty-nine of Mansfield's Digest as is material to the decision of this case is as follows:

(1). *Section 2522.* "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children or their descendants, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brother or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts, and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

(10) *Section 2531.* "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother the estate, or so much thereof as came by the

mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend in remainder, to the collateral kindred of the intestate in the manner provided in this act; and in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided."

(11). *Section 2532.* "The estate of an intestate, in default of a father and mother, shall go. first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation."

(12). *Section 2533.* "Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance comes to the intestate by descent, devise or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor, shall be excluded from such inheritance."

(13). *Section 2534.* "In all cases not provided for by this act, the inheritance shall descend according to the course of the common law."

(14). *Section 2535.* "Whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall inherit as tenants in common, in proportion to their respective shares or rights."

CONSTRUCTION.

(19). *Section 2540.* "The term 'real estate' as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seized or possessed thereof in any manner other than by lease for years and estate for life of another person."

(20). *Section 2541.* "The term 'inheritance' as used in this act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this act."

(21). *Section 2542.* "Whenever, in any part of this act, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent came; and, when any person is described as having died, it shall be understood that he died before the intestate."

(22). *Section 2543.* "The expression used in this act, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to or from any relative of the blood of such parent." (Rev. Stat., Chap. 49).

[The numbers in parenthesis at the beginning of each paragraph above are the original numbers of the sections. The numbers following the word "Section" are the numbers given in Mansfield's Digest.]

It is the contention of the plaintiff in error that the allotment of Andrew J. Berryhill was a new acquisition in him and that it was not an ancestral estate. When the Statutes of Arkansas were adopted in the Indian Territory, they were adopted with the same construction that had been placed on them by the decisions of the Supreme Court of Arkansas, rendered prior to the adoption of the statutes. This has been decided often with reference to the Statutes of Arkansas extended over the Indian Territory and is a familiar rule of construction. In the case of *Robinson & Company* v. *Belt*, 107 U. S. 41, 47 L. ed. 65, discussing the construction to be given a certain Arkansas Statute put in force in the Indian Territory, this Court said (p. 47, L. ed. p. 68):

> "While the case under consideration arose in the Indian Territory, the law applicable thereto is determined by the laws of Arkansas, which were adopted and extended over the Indian Territory by the act of Congress approved May 2, 1890 (26 Stat. at L. 94, s. 31), which declares that certain general laws of Arkansas, 'which are not locally inapplicable, or in conflict with this act, or with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory,' among which laws are enumerated assignments for the benefit of creditors and the statute of frauds. *In adopting this law with respect to assignments, the courts of the Indian Territory are also bound to respect the decisions of the Supreme Court of Arkansas interpreting that law.*

"In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus, in *Pennock* v. *Dialogue*, 2 Pet. 1; 7 L. ed. 327, it was said by Mr. Justice STORY (p. 18, L. ed. p. 333): 'It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.' In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20, L. ed. p. 334): 'The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke.' In *Cathcart* v. *Robinson*, 5 Pet. 264, 8 L. ed. 120, Mr. Chief Justice MARSHALL said (p. 280 L. ed. 126): 'By adopting them (British Statutes), they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed, to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however, we may respect subsequent decisions—and certainly they are entitled to great respect—we do not admit their

absolutely authority.' See also *Kirkpatrick* v. *Gibson*, 2 Brock. 388, Fed. Cas. No. 7848. The same rule has been applied in the state courts in the construction of statutes adopted from other states. *Com.* v. *Hartnett*, 3 Gray 450; *Tuler* v. *Tyler*, 19 Ill. 151; *Bloodgood* v. *Grasey*, 31 Ala. 575; *Marqueze* v. *Caldwell*, 48 Miss. 23; *State* v *Robey*, 8 Nev. 312; *The Devonshire*, 8 Sawy. 209, 13 Fed. 39."

The court then goes on to cite Arkansas cases and to follow their construction. To the same effect see the following decisions of the courts having jurisdiction over the Indian Territory prior to its incorporation in the State of Oklahoma:

Sanger v. *Flow*, 48 Fed. Rep. 152;
Blaylock v. *Incorporated Town of Muskogee*, 117 Fed. 125;
McFadden v. *Blocker*, 2 Ind. Ter. 260; 48 S. W. 1043; 58 L. R. A. 878;
Blaylock v. *Incorporated Town of Muskogee*, 4 Ind. Ter. 43; 64 S. W. Rep. 609;
Boyd v. *Mitchell*, 4 Ind. Ter. 47; 64 S. W. Rep. 610.
Zufall v. *United States*, 1 Ind. Ter. 638; 43 S. W. 760;
Randolph v. *United States*, 1 Ind. Ter. 705, 43 S. W. 1098;
Carter v. *Barton*, 2 Ind. Ter. 99; 48 S. W. 1017;
LeBosquet v. *Myers*, 103 S. W. 770 (I. T.);
J. B. Bostic Co. v. *Eggleston*, 104 S. W. 566, (Ind. Ter.);
Western Investment Co. v. *Davis*, 104 S. W. 573 (Ind. Ter.)

Assuming that this contention is correct and that this court will give this statute the construction which had been given to it prior to its adoption in the Indian Territory, we will look to the decisions of the Supreme Court of the State of Arkansas to ascertain what that construction was. The leading case in the State of Arkansas construing the provisions of Chapter 49 of Mansfield's Digest is the case of *Kelly's Heirs* v. *McGuire's Heirs*, 15 Ark. 555. This case took up the chapter and discussed all of its provisions and painstakingly construed the various provisions of the chapter. This decision, almost a statute of itself, has remained from the time of its rendition to the present as a guide and rule to the bench and bar of the State of Arkansas. The construction given there has never been departed from in the State of Arkansas and that case was always looked to as the final and binding authority by the courts and bar of the Indian Territory, prior to the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal*, 170 Fed. 529. The court in *Kelly* v. *McGuire* said, (page 584):

> "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions and qualifications*, hereafter more particularly noticed and these exceptions refer to *real estate alone*. This section also constitutes the table by which real estate is to descend and personal property to be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the

legislature, when there were *descendants* of the intestate, to send down both to them *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to *how the property had been acquired.*"

The court further said (page 585):

"The 1st, 4th, 5th, 15th, 16th, 17th and 18th sections, are the only ones designated, in our opinion, to apply to both real and personal estate. All the rest embrace real estate alone.

"The effect of the 1st section is, to constitute the persons, who take the personal property, whether *per capita* or *per stirpes*, and whether the whole or half-blood, the absolute owners. Nor is it material, whether those persons are of the paternal or maternal, or the lineal or collateral line. By that section, as already remarked, real and personal estate goes in the same channel, and if no subsequent provisions had been introduced, touching real estate, the precise bearing of which, it is probable the rivers (revisers) did not perceive, our labors would have been comparatively easy. At present nothing further need be said as to personal property, as we shall find it necessary to allude to that hereafter, and shall now speak in reference to real estate.

"The effect of the 1st section, subject to the exceptions and qualifications alluded to, is to vest an absolute estate of inheritance in lands in the person who takes. And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendable; or, as the first section expresses it,

'having title to any real estate of inheritance,' constitutes an inheritable estate, thus abolishing the common law doctrine, derived from the feudal times, of actual seizin in the ancestor. Whoever claimed by descent, was bound to show that he was heir to the first purchaser; and the seizin of the last possessor, from whom he claimed as heir, was considered as presumptive evidence of his being of the blood of the first purchaser. It supplied the difficulty of investigating a descent from a distant stock, through a line of succession become dim by the lapse of ages. 4 Kent. 386.

"But with us, ownership, or title to property, is substituted for seizin; and that maxim *seisina facit stipitem,* of such controlling consequence in the English scheme of descents, is entirely superseded. By descent or hereditary succession, it is understood the title whereby a person, upon the death of his ancestor, acquires the estate of the latter as his heir at law. 3 Bac. Abr. Descent 104.

"We pass now to the more particular consideration of the 10th section.

"The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that an estate could never ascend; but should rather escheat to the lord. And so, if it comes by or on the part of

the mother, it goes to the mother and her heirs, in the exclusion of the heirs of the father. In other words, it remains in the paternal or maternal line, from whence it was derived.

"The expressions, 'come by the father,' or 'mother' or on 'the part of the father' or 'mother' mean the same thing. *Maffit* v. *Clark*, 6 Watts & Serg. 260. They are familiar to, and derived from the common law, having an appropriate, technical meaning, which we must suppose the Legislature intended to adopt. They embrace not only the father, but all of the ancestors of the father, both paternal and maternal. Co. Litt. 12 a. Whenever, says Lord Coke, lands do descend from the part of the mother the heirs of the part of the father shall never inherit. And likewise, when lands descend from the part of the father, the heirs of the part of the mother shall never inherit. Co. Litt. 13 a.

"The 10th and 22nd sections must be construed together, although the exact expressions used in the latter, are not contained in any part of the statute. But words of equivalent signification, are employed, and they are embraced within the spirit of the 22nd section. Any other exposition would render the section entirely nugatory; and we must so construe statutes as that every part may have its proper effect, if possible.

"The expression, then, 'come by the father or mother' is not limited to an estate acquired by descent merely, but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any relation of the blood, of such parent. Such is the letter and spirit of the statute. In other words, there are two classes provided for: one, where

the blood of the person, from whom the estate came, whether it be by descent, devise or gift, is regarded; and the other, where the blood of the intestate forms the *stirpes,* or stock of descent, without respect to ancestral blood.

"Chancellor Kent says there is a difference in the laws of the several states, between the succession to estates, which the intestate had acquired in the course of descent, or by purchase. 'If the inheritance,' says he, 'was ancestral, and came to the intestate by gift, devise or descent, it passes to the *kindred* who are of the *blood of the ancestor from whom it came,* whether in the paternal or maternal line.' 4 Kent 404.

"The portion of the 10th section, as to *new acquisitions,* gives the father and mother a life estate only, with remainder to the collateral heirs of the intestate: such as brothers and sisters, and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford itself, an exact idea of the mode of acquisition. By common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. In the first, it was by operation of law; and in the second, by act or agreement of parties. Devises and gifts fall in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first of the paternal and then of the maternal line. 2 Bl. Com. 243.

"It must be understood, however, that a new acquisition in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, *(Brewster* v. *Benedict* 14 Ohio 385*)*, or by will or deed from a stranger. In other words, it is an estate derived

from any source other than descent, devise or gift, from father or mother, or any relative in the paternal or maternal line. *Butler* v. *King*, 2 Yerg. 116.

"If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition and descend as such; because nothing is received by way of bounty at the hands of ancestors, which is the case as to lands descended from, or devised, or given by them to the intestate, and it was thought reasonable that they should remain in the blood from which they came.

"Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes by gift, devise or descent, either mediately or immediately from them, or from any person in their respective lines. *Shippen* v. *Izard*, 1 Serg. & Rawle. 223."

Further in the opinion the Court epitomizes as follows (p. 590):

"After carefully considering each of the provisions of the statute, and altogether as a whole, we have come to the following conclusions:

"*1st.* That, as to both real and personal property, it was the design of the Legislature, when there were *descendants* of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the estate was acquired.

"*2nd.* That, as to personal property, it was the design, where there were no descendants, that it should go to collaterals in the same way

it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without inquiry as to how the property was acquired by the intestate.

"*3rd.* That, as to real estate, it was the design of the Legislature, where there were no descendants, to point out the lines of the succession, and that this is to depend on the fact, whether the inheritance is ancestral or new; and, if ancestral, then whether it come from the paternal or maternal line.

"*4th.* If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion of the mother's line; and so on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

"*5th.* If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncle and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncle and aunts, and their descendants; unless there should be kindred, lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts; in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands, it would become an

ancestral estate, and always go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances. Digest, secs. 10 and 11, p. 437."

"*6th.* That, when the inheritance is fixed by these facts in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the 1st section, which is to be considered as the general table of descent. The father, mother, brothers, sisters and so on, mentioned in that section, are those who are to be considered when counting from any propositus whether the propositus of a single line only, or the concurring propositus of both lines, as the intestate is, as to personal property."

Besides the case of *Kelly* v. *McGuire,* 15 Ark. 555, this statute has been construed by the Supreme Court of Arkansas in two other cases and applied to a state of facts believed to be analogous to the facts of the present case.

In the case of *Hogan* v. *Finley,* 52 Ark. 55; 11 S. W. 1035, it was decided that where a father, desiring to procure the title to certain lands belonging to the state and to give them to his son, procured a donation deed from the state to his minor son and paid the fees and expenses necessary to obtaining the deed, the title so obtained was a *new acquisition* in the son, that the father took only a life estate in the lands and that he had no interest in the lands he could devise.

To the same effect is the case of *Magness* v. *Arnold*, 31 Ark. 103. These cases, as well as the case of *Kelly's Heirs* in 15 Ark. 555, had been the settled construction of the statute in Arkansas for years before the statute was adopted in the Indian Territory, and still is. (*Wheelock* v. *Simons*, 75 Ark. 19; 86 S. W. 830.) In putting the statute in force in the Indian Territory, Congress undoubtedly intended to extend with it the construction that had been placed upon it by the Supreme Court of Arkansas.

The Land Was a New Acquisition in Andrew J. Berryhill and Not an Ancestral Estate.

In ascertaining whether the land in controversy was a new acquisition in Andrew J. Berryhill or an ancestral estate, it becomes necessary to examine the statutes in force at the time the land was allotted and under which it was allotted. The original intention of Congress appears to have been to give the allotments to the living members of the tribe (Sec. 11, Act of June 28, 1898, entitled, "An Act for the protection of the people of the Indian Territory and for other purposes," 30 Stat. 495): but later recognizing that there must be a time fixed upon which all persons living at that time were entitled to allotment, it was provided by Section 28 of the Original Creek Agreement, approved March 1, 1901 (31 Stat. 861) and ratified by the Creeks May 25, 1901, that:

> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine,

entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eight, eighteen hundred and ninety-eight, entitled, 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

Section seven of the Supplemental Creek Agreement (32 Stat. 500) provides:

"All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

Section five of the Act of April 26, 1906 (34 Stat. 137) provides:

"That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deeds had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same; Provided, the provisions of this section shall not affect any rights involved in the contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

It seems clear that under these provisions the lands and moneys were to descend in the same way and go to the same persons as would have taken them, had the children coming within the purview of these sections lived until their allotments were selected and then died seized thereof. (See *Sizemore* v. *Brady*, decided by this Court December 21, 1914.) An argument has been made to the effect that because a dead person cannot take title to land, and

because the land was allotted direct to the heirs instead of the deceased member of the tribe, in whose right it was taken, it was not an inheritance in the heirs but a direct allotment in them; but conceding (and it must be conceded) that the title never vested in the allottee but did vest direct in the heirs, yet it vested in the same heirs who would have inherited had the deceased person selected an allotment prior to his death and died seized thereof leaving the same persons related to him in the same way. (*Reynolds* v. *Fewel*, decided by this Court Jan. 18, 1915.) The takers of the land took from the deceased allottee. It was his land they took and their rights are governed and must be governed in exactly the same way as if he had taken the land before his death.

In the case of *Shulthis* v. *McDougal*, 170 Fed. 529, the learned court held that the allotment of Andrew J. Berryhill was ancestral and that he obtained the allotment by reason of his blood and that this blood came from his father. It is true that he became entitled to enrollment by reason of his Creek citizenship; but that does not mean that he inherited anything from his father in the sense in which the term was used in the Arkansas statutes. The statute was meant to apply directly to the property and was intended to give character to the inheritance as it conveyed the *property*. The *status* of Andrew J. Berryhill was necessary to his obtaining title to the property but it was no part of the title. He might have obtained the status in some other

way. He might have become a Creek citizen by adoption; but he would still have obtained an allotment in the Creek Nation, if he had become a member of the tribe. On the other hand, he might have been a Creek Indian by blood, but yet by non-residence he could have forfeited his right to citizenship (Sec. 21 Act June 28, 1898, 30 Stat. 495). For a person to become entitled to pre-empt or homestead public lands of the United States, he must be a citizen of the United States or have filed a declaration of intention (Rev. Stat. Sec. 2289); but still, the fact that a homesteader was a citizen of the United States by virtue of being a son of a citizen of the United States would not make his homestead an ancestral estate, so that upon his death it would go to his father. *Magness* v. *Arnold,* 31 Ark. 103; *Hogan* v. *Finley,* 52 Ark. 55, 11 S. W. 1035.

The trouble with the decision in the case of *Shulthis* v. *McDougal* is that the court confuses the *status* of Andrew J. Berryhill as a member of the Creek Tribe with his *title* to the allotment. The connection between the two is not necessary but only incidental. (*McKee* v. *Henry,* 201 Fed. 74.)

Citizenship in Creek Nation Not a Property Right at All.

This is settled by the *Cherokee Intermarriage Cases,* 203 U. S. 76, 51 L. ed. 96. In that case it was held that citizenship in the Cherokee Tribe or

Nation and property rights in the property of that nation were distinct things. This court quotes the decision of the Court of Claims, rendered in the same case, as follows (p. 84; 51 L. ed. 100):

> "These constitutional amendments were brought about by the action of the United States at the close of the Civil war in dictating that the slaves or freed persons of color in the Cherokee country should not only be admitted to the rights of citizenship, but to an equal participation in the communal or common property of the Cherokees. * * * Under the policy of the Cherokees, citizenship and communal ownership were distinct things. The citizen who annually received an annuity derived from the communal fund held by the United States, and the citizen who never received a dollar from the fund, or never so much as thought of receiving it, form a concrete object lesson in constitutional law not easily effaced from the common mind."

Further in the opinion the court quoted certain sections of the Cherokee Constitution of 1839, and said that the provisions did not amount to a grant of property rights. This opinion, as construed by the writer of this brief, decides that property rights in the lands and moneys of the tribe are entirely distinct from citizenship in the tribe and have no necessary relation thereto, and so also do the next two opinions referred to.

In the case of *Wallace* v. *Adams*, 143 Fed. 716, Judge Sanborn in an opinion which has been read

and quoted oftener than any other of the Circuit Court of Appeals, (so often that the pages containing the case in the volume in the Muskogee Law Library are blackened by use and the volume naturally falls open at the opinon), held that the matter of enrolling citizens of the Choctaw Nation was legislative and not judicial. This case was affirmed by this court in 204 U. S. 415, 51 L. ed. 547. It was held in these cases that no property right was conferred by citizenship that would prevent Congress from providing for a review of the judgments of the United States Courts in the Indian Territory after they had become final.

In *Stephens* v. *Cherokee Nation,* 174 U. S. 445; 43 L. ed. 1041; this court, speaking of the contention that the act of July 1st, 1898, which extended the right of appeal in citizenship cases to this court, was invalid because retrospective, an invasion of judicial domain and destructive of vested rights, said (p. 478):

> "In its enactment Congress has not attempted to interfere in any way with the judicial department of the government, nor can the act be properly regarded as destroying any vested right, since the right asserted to be vested is only the exemption of these judgments from review, and the mere expectation of a share in the public lands and moneys of these tribes, if hereafter distributed if the applicants are admitted to citizenship, cannot be held to amount to such an absolute right of property that the original cause of action, which is citizenship or not,

is placed by the judgment of a lower court beyond the power of re-examination by a higher court though subsequently authorized by general law to exercise jurisdiction."

The Lands of the Creek Nation Prior to Allotment Belonged to the Creek Nation as a Political Body and Not to the Individual Members.

The lands of the Creek Nation did not belong to the individual members prior to their allotment. The title was in the nation as a political body. This is shown clearly by the treaty under which the land was patented to the Creeks. Article III of the treaty of 1833, (Kapplers Indian Affairs, Laws and Treaties, Vol. 2, 1904 edition) is as follows:

> "The United States will grant a patent, in fee simple, to the Creek Nation of Indians for the land assigned said Nation by this treaty or convention, whenever the same shall have been ratified by the President and Senate of the United States—And the right thus guaranteed by the United States shall be continued to said tribe of Indians, so long as they shall exist as a nation, *and continue to occupy the country hereby assigned them.*"

The patent made in pursuance of this treaty dated August 11, 1852, after reciting some of the provisions of the treaty of 1833, proceeds as follows:

> "*Now know ye, that the United States of America*, in consideration of the premises, and in conformity with the above recited provisions,

of the treaty aforesaid, have given and granted, and by these presents do give and grant, unto the said Muskogee or Creek Tribe of Indians, the tract of country above described. *To have and to hold,* the same, unto the said tribe of Indians, so long as they shall exist as a Nation, *and continue to occupy the country hereby conveyed to them.*" (The words "and continue to occupy the country, etc." are italicized by the writer of this brief.)

The courts have passed on the question several times with reference to the lands of the various tribes. The title by which all of the Five Civilized Tribes held their lands prior to allotment was about the same. There was no material difference in the character of title in the Creek land and the land of the Cherokees. In the case of *Eastern Cherokees* v. *United States and Cherokee Nation,* 117 U. S. 312, 29 L. ed. 880; the Eastern Band of Cherokees sued for a proportionate part of the funds belonging to the Cherokee Nation, derived from the sale of certain lands, part of which were west of the Mississippi River. This court denied the right to recover and among other things said:

> "Their claim, however, rests upon no solid foundation. The lands, from the sale of which the proceeds were derived, belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common that he could claim a pro rata proportion of the proceeds of

sale made of any part of them. He had a right to use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States."

In *Stephens* v. *Cherokee Nation* and kindred cases, reported in 174 U. S. 445; 43 L. ed. 1041, already quoted, the court said (p. 488):

> "But in any aspect, we are of the opinion that the constitutionality of these acts in respect to the determination of the citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradicition in terms."

In the case of *Journeycake*, cited by Judge AMIDON in the *Shulthis* case, Mr. Justice BREWER, speaking of the interests of certain Delaware Indians in the lands of the Cherokees, said (155 U. S. 197, 215; 39 L. ed. 120, 125):

> "That interest being like that of the native Cherokees limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and the right to share in any future allotment."

The case of *J. E. Fleming, et al.* v. *Green McCurtain, et al,* 215 U. S. 56, 54 L. ed. 88, was a suit brought on behalf of several thousand persons claiming to be Choctaws and Chickasaws by blood, for their share of tribal properties, and asking to have a trust declared therein in their favor. This court, speaking by Mr. Justice HOLMES, said (p. 59):

> "As we cannot agree with this construction, it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiff's case is upon the words of the treaty and the patent we have set forth. Those words seem to us to convey a different meaning on their face,—a meaning that could not be changed, but rather confirmed, if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do."

A very plain declaration of the status of the lands of the Choctaw tribes was made by Judge HOOK of the Eighth Circuit Court of Appeals in the case of *Ligon* v. *Johnson,* 164 Fed. 670, he said:

> "That the lands involved were public lands, belonging to the Choctaw and Chickasaw Nations and not to the individual members, has been assumed without contradiction from the inception of the titles through a long sequence of acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is only in the broad comprehensive sense in which the *public property of any government is in trust for the welfare of its people.* Until

specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justiciable by the courts."

In the case of *McKee* v. *Henry,* 201 Fed. 74, the court said:

"The enrolling primarily established the right of citizenship, and only incidentally conferred the right to allotment, and until allotment was made no inheritable right vested in the individual Indian.

"The title, so far as here pertinent, of the Creeks, was identical with the title of the Cherokees to their lands, and in *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 307, 23 Sup. Ct. 115, 120 (47 L. ed. 183) it is said:

'Whatever title the Indians have is in the tribe and not in the individuals, although held by the tribe for the common use and equal benefit of all the members. *The Cherokee Trust Funds,* 117 U. S. 288, 308 (6 Sup. Ct. 718, 29 L. ed. 880). The manner in which this land is held is described in *Cherokee Nation* v. *Journeycake,* 155 U. S. 196, 207 (15 Sup. Ct. 55, 60; 39 L. ed. 120), where this court referring to the treaties and the patent mentioned in the bill of complaint herein, said: "Under these treaties, and in December, 1838, a patent was issued to the Cherokees for these lands. By that patent, whatever of title was conveyed was conveyed to the Cherokees as a nation, and no title was vested in severalty in the Cherokees, or any of them".'

"As already suggested, if enrollment conferred a vested interest in any lands, why did it not confer a vested interest in any money or other property belonging to the tribe? Yet, it has been held that the power of Congress to admit new persons to the rolls, thereby depleting the amount which would go to those previously on the rolls, is political in its character, and not within the control of the courts. *Muskrat* v. *United States,* 219 U. S. 346, 31 Sup. Ct. 250, 55 L. ed. 246.

In *Woodbury* v. *United States,* 170 Fed. 302, 95 C. C. A. 498, this court characterized the right of an Indian long after his enrollment, but before allotment, as 'a mere float—giving him no right to any specific property'."

In the case of *Delaware Indians* v. *Cherokee Nation,* 193 U. S. 127; 48 L. ed. 646, this court speaking by Mr. Justice DAY said:

"The provisions of the Cherokee constitution and the statutes passed in pursuance thereof pertinent to the subject are collected in the opinion of the Court of Claims in the *Journey-cake* case, and are cited in a note to the opinion of this court in the same case. 155 U. S. 207, 39 L. ed. 124, 15 Sup. Ct. Rep. 55. From them it is apparent that lands to be held upon the same terms as the Cherokees hold their lands cannot be alienated by those who occupy and hold them but the ownership is lodged in the Cherokee Nation. The individual has no right to alienate or lease the lands. The Nation grants and restricts the right of occupancy. The title to the lands is vested in the government, to be held

and controlled in such wise as to promote the general welfare."

See also *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294, 47 L. ed. 183.

The last and plainest declaration of the status of the Creek lands prior to allotment is contained in the opinion of this court delivered by Mr. Justice VAN DEVANTER, December 21, 1914, in the case of *William Sizemore, et al,* v. *Foil M. Brady.* In that case the court said:

> "Anterior to the legislation which we must consider, the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. *It was neither alienable or descendible.*" (Italics, by the writer of this brief.)

Further in the opinion, the court said:

> "On the part of the maternal cousins it is contended that the provisions in the original agreement relating to the allotment and distribution of the tribal lands and funds were in the nature of a grant *in praesenti,* and invested every living member of the tribe and the heirs, designated in the tribal laws, of every member who had died after April 1, 1899, with an absolute right to an allotment of lands and a distributive share of the funds, and that Congress could not recall or impair this right without

violating the due process of law clause of the 5th Amendment to the Constitution. To this we do not assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them. Unless and until that was done Congress possessed plenary power to deal with them as tribal property. It could revoke the agreement and abandon the purpose to distribute them in severalty, or adopt another mode of distribution, or pursue any other course which to it seemed better for the Indians. And without doubt it could confine the allotment and distribution to living members of the tribe, or make any provision deemed more reasonable than the first for passing to the relatives of deceased members the lands and money to which the latter would be entitled, if living. In short, the power of Congress was not exhausted or restrained by the adoption of the original agreement but remained the same thereafter as before, save that rights created by carrying the agreement into effect could not be divested or impaired. *Choate* v. *Trapp*, 224 U. S. 665, 671; 56 L. ed. 941, 944; 32 Sup. Ct. Rep. 555.

"In principle it was so held in *Gritts* v. *Fisher*, 224 U. S. 640; 56 L. ed. 928; 32 Sup. Ct. Rep. 580. There an act or agreement of 1902, had made provision for allotting and distributing the lands and funds of the Cherokees in severalty among the members of the tribe who were living on September 1, 1902, and an act of

1906 (32 Stat. at L. 137, chap. 1876) had directed that Cherokee children born after September 1, 1902, and living on March 4, 1906, should participate in the allotment and distribution. By enlarging the number of participants the later act operated to reduce the distributive share to which each would be entitled, and because of this the validity of that act was called in question, the contention being that the prior act confined the allotment and distribution to the members living September 1, 1902, and therefore invested them with an absolute right to receive all the lands and funds and that this right could not be impaired by subsequent legislation. This court rejected the contention and said (p. 648): 'No doubt such was the purport of the act. But that, in our opinion, did not confer upon them any vested right such as would disable Congress from thereafter making provision for admitting newly born members of the tribe to the allotment and distribution. The difficulty with the appellants' contention is that it treats the act of 1902 as a contract, when "it is only an act of Congress and can have no greater effect." *Cherokee Intermarriage Cases,* 203 U. S. 76, 93; 51 L. ed. 96, 103; 27 Sup. Ct. Rep. 29. It was but an exertion of the administrative control of the government over the tribal property of tribal Indians, and was subject to change by Congress at any time before it was carried into effect, and while the tribal relations continued. *Stephens* v. *Cherokee Nation,* 174 U. S. 445, 448; 43 L. ed. 1041, 1056; 19 Sup. Ct. Rep. 722; *Cherokee Nation* v. *Hitchcock,* 187 U. S. 294; 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Wallace* v. *Adams,* 204 U. S. 415; 423; 51 L. ed. 547, 551; 27 Sup. Ct. Rep. 363'."

The matters of enrollment and of allotment were entirely separate and distinct. It is true that by the treaty the right of allotment is made to depend upon citizenship but still the two rights could have been separate, and it was not because of any *necessary* relation between them that the one was made to depend upon the other. Prior to the allotment the title to the land was in the tribe just the same as the lands of the United States are in the United States until homesteaded by one of her citizens, and the father had nothing that the son could or did inherit. The individual ownership and descendible title of the father in *his* allotment began when his allotment was selected, just exactly as the son's title began in *his* allotment when *it* was selected. It was an entirely new and distinct estate from that which had existed in the tribe prior to the selection.

The term "estate" signifies the condition, relation or circumstance in which the owner stands with regard to his property (2 Minors Institutes, 3rd ed., p. 78). It is clear from the decisions cited and quoted that prior to allotment the individual members of the tribe had no individual title either legal or equitable. The title was in the tribe or nation as a corporate or political body and was in the nation no longer than it remained on the lands. The title in the nation was a base or qualified fee. (2 Blackstone, Lewis ed. 569, star p. 109; 2 Minors Institutes, 3rd ed., p. 86).

There was a contingent reversionary interest in the United States. The individual obtained his right to stay on the lands of the tribe *from the laws of the tribe and not from any property right* he had in the land. The title made by the treaty, selection of an allotment and patent made an entirely new title and estate in each allottee and it was a *new acquisition* in the person who first received it. In the case of *Shulthis* v. *McDougal,* Judge AMIDON stated that Andrew J. Berryhill received the land by virtue of his blood. This is not accurate. His blood, or rather his membership in the tribe, was merely a condition to his getting the land, and does not signify that he got the title from his faher. His blood was merely evidence of his membership in the tribe.

In the opinion of *Shulthis* v. *McDougal* the court seemed to take the position that the child, the deceased allottee, received the land some way unknown to the Arkansas law and for that reason the Arkansas Statute did not apply. The court says that in Arkansas there are no means of acquiring land except by grant, devise or inheritance, and then says that the Indian lands fitted into none of these classes. This reasoning is not sound. The land was granted from a sovereignty, who prior to the allotment had held the legal and equitable title to the deceased allottee of his heirs. It was a grant not merely technically but *substantially.*

The Arkansas Statute made all estates that were not derived from father or mother or relatives

in either the paternal or maternal line, new acquisitions. (*Kelly* v. *McGuire*, 15 Ark. 555). This land did not come that way because *neither father, nor mother nor any relative of either had ever had it.* It is not pretended that the father or mother or any relative of either gave or devised it to Andrew J. Berryhill. It is claimed though that he received it as a sort of *quasi* inheritance. But he could not have inherited it from his father because HIS FATHER WAS NOT DEAD. No one can be the actual complete heir of another until the ancestor is dead. *Nemo est hoeres viventis.* (2 Blackstone Lewis ed. 675; star page 208; 2 Minors Inst. 3rd ed. 519.) It will be a very remarkable phenomenon if Andrew J. Berryhill can inherit from his father and then his father, still living, inherit the same property back from him.

George Franklin Berryhill not only never owned the land but he never could have owned it had Andrew J. Berryhill not lived at the proper time to obtain it as an allotment.

The Court is most *earnestly* requested to consider this *proposition.*

If Andrew J. Berryhill had not received this allotment his father would not have received it. It would have been disposed of as provided in Section 9 of the Original Creek Agreement (31 Stat. 861) and used to equalize allotments and GEORGE

FRANKLIN BERRYHILL WOULD NOT HAVE BEEN ENTITLED TO ONE FOOT MORE OF THE LAND OR ONE PENNY MORE OF THE PROCEEDS OF ITS SALE THAN ANY OTHER MEMBER OF THE CREEK TRIBE SIMILARLY SITUATED. How then can it be said that Andrew J. Berryhill inherited it from him?

Specification IV.

The Supreme Court of the State of Oklahoma erred in holding that the evidence offered to the effect that the decision of the Circuit Court of Appeals in *Shulthis* v. *McDougal* had not been followed or acquiesced in by the bar of the State of Oklahoma, or by the *nisi prius* judges, was not admissible.

The case of *Pigeon* v. *Buck*. 38 Okla. 101, 131 Pac. 1083, without much discussion followed the case of *Shulthis* v. *McDougal* and stated that to do otherwise would overturn what had become a rule of property.

The testimony of Mr. N. A. Gibson, a prominent member of the bar of the State of Oklahoma, begins on page 66 of the record. He testified that prior to the case of *Shulthis* v. *McDougal*, he advised his clients that an allotment of lands in any of the Civilized Tribes was a new acquisition; that prior to that decision it was the concensus of opinion among

the members of the bar practicing in the Indian Territory side of the State of Oklahoma that such allotments were new acquisitions. He testified that after that opinion was rendered he continued to advise clients that they should procure conveyances from collateral kindred as well as the parents of deceased allottees who died without issue. The question was asked him (Record page 68): "Bearing in mind the act of April 21, 1904, and the act of April 26, 1906, and the act of May 27, 1908, and bearing in mind that the opinion of *Shulthis* v. *McDougal, et al,* was rendered June 9, 1909, and appealed to the Supreme Court of the United States and dismissed for want of jurisdiction on the 7th day of June, 1912, what proportion of the titles where this question was involved, has been purchased on the theory that the parent only owned a life estate and what proportion on the theory that parent owned the fee?" He answered: "I should say that a very large proportion, probably 95% of all lands purchased from heirs of deceased Indian allottees have been purchased on the theory that the parent inherited the life estate only and not the fee." He also testified in substance that he was familiar with Bledsoe's Indian Land Laws and with an article read before the Bar Association of the State of Oklahoma. Mr. Gibson has practiced law in Oklahoma and Indian Territory for many years. He has been well known as one of the leaders of the bar of the state for years and has a large practice

in all the courts having jurisdiction of Indian questions, including this court.

The testimony of Mr. J. C. Stone begins on page 69 of the record. His testimony is the same in substance as that of Mr. Gibson. Mr. Stone is also a prominent member of the bar of Oklahoma with a wide practice in all the courts, including this one, and his standing is also indicated by the fact that the Supreme Court of Oklahoma offered him a place on the Supreme Court Commission of the state. (Record, page 70).

The testimony of Mr. Guy L. Andrews is found on page 86 of record. His testimony is to the same effect of that of Messrs. Gibson and Stone. Mr. Andrews is a leading member of the bar of McAlester, which is the principal court town of the Choctaw Nation. The testimony of Mr. Jean P. Day is found on page 88 of the record. His testimony is to the same effect as that of Messrs. Gibson, Stone and Andrews, and he said further (page 89) of record, that after the decision in *Shulthis* v. *McDougal,* the probate court continued to treat such titles as if the collateral kindred had an interest. Mr. Day was one of the compilers of the Oklahoma Code and is a prominent lawyer. Portions of Mr. Bledsoe's book on Indian Land laws were offered in evidence as Exhibits A., B., C. and D. to the testimony of Mr. Gibson. A paper read before the Bar Association of the State of Oklahoma was offered in

evidence as exhibit E. to Mr. Gibson's testimony. These exhibits are found in the record, beginning on page 73 and ending on page 83.

The plaintiff in error offered to prove the same facts by Mr. Gray Carroll, Mr. A. J. Biddison and Mr. C. S. Walker, all leaders of the Tulsa bar (record page 53). He also offered to prove the same facts by Mr. D. B. Hughes of the Sapulpa bar, since elected District Judge of his district. He also offered the testimony of Messrs. Frank P. Smith, J. F. Lawrence and L. O. Lytle of the Sapulpa bar, all prominent lawyers (record page 54). He also offered the testimony of Mr. Harry Campbell of the Tulsa bar to the same effect. He also offered to prove (record page 54) that several District Judges refused to follow the case of *Shulthis* v. *McDougal* and that the County Judge of Creek County had refused to follow it. (Record, page 55.)

This evidence was all excluded. In excluding it and passing on the case District Judge Poe, who tried this case in the District Court of Tulsa County, Oklahoma, said (record, page 65): "The decree will be of course in favor of the defendants, practically upon the pleadings and upon the exclusion of the evidence offered. I am satisfied all these things could be proven if it hadn't been that the Supreme Court had decided it. I think it is true, universally understood, that the members of the bar held the same opinion as you adhere to, but I don't think they have got the power to overrule our court of

last resort." (Judge Poe was referring to the Supreme Court of Oklahoma when he mentioned "Supreme Court" and "Court of last resort.")

In 11 Cyc. 755, it is said:

> "Where judicial decisions may fairly be presumed to have entered into the business transactions of a country and have been acted upon as a rule of contracts and property, it is the duty of the court, on the principle of *stare decisis*, to adhere to such decisions without regard as to how it might be inclined to decide if the question were new."

This is believed to be a fair statement of the doctrine of "Rule of Property."

In offering the excluded evidence the plaintiff in error believed that the question as to whether or not that decision had become a rule of property was one for the court to determine as one of fact, and while it might not be an *issuable fact*, it was yet a fact concerning which the court should *inform itself* and that he had a right to prove that the decision in *Shulthis* v. *McDougal* had not entered into the business transactions of the country where the land was situated. No case like this has been found, but the writer confidently believes it is the duty of a court to *inform itself* as to when a decision has become a rule of property. A court should not close its ears to offered information and judicially know something which the party, against whom the knowledge will operate, controverts the fact and offers infor-

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1914.

No. 676.

DANIEL A. McDOUGAL, - - *Plaintiff in Error,*

vs.

EDMOND McKAY, et al., - - *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF OF PLAINTIFF IN ERROR IN ANSWER TO REPLY BRIEF OF DEFENDANT IN ERROR AND TO BRIEF OF *AMICUS CURIAE.*

It is a little difficult to write a reply brief without again traversing ground already gone over. But before entering into the controverted questions it should be stated that the plaintiff in error agrees with the position taken in Point One of defendants in error's brief on page 5 thereof.

The application of the Arkansas law of descent should be just the same in this case as if Andrew J. Berryhill had survived to receive his allotment and had then died intestate.

Now this question is referred to in our original brief, but that was before the *amicus curiae* brief had been written in the case, and as it was known that counsel for defendants in error, held the same views on this subject as are entertained by counsel for plaintiff in error, but little attention was paid to the question. As the question is well covered by the brief of defendants in error, but little will be said here on this subject.

The *amicus curiae* bases his argument on the proposition that Section 7 of the Supplemental Creek Agreement (32 Stat. L. 500), in providing that the lands and monies to which a deceased child who died after May 25, 1901, and before receiving his allotment, should descend to his heirs "and be allotted and distributed to them accordingly," used the term "heirs" merely as *descriptio personae,* and that it being ascertained who the heirs were, they all would take equal shares without reference to the share they might have taken had the allottee died after receiving his allotment and the land descended to the heirs in the technical sense.

This proposition is not well founded. The commissioners and persons representing the Creek Nation in using the language contained in Section 7 meant that the property should go to the same per-

sons and in the same way as if the allottee had died after the allotment was made. In addition to the able argument made by defendants in error under Point One referred to above, and also in reply to the brief of John B. Meserve, *amicus curiae,* beginning on page 65 of defendants in error's brief, it is believed that a further argument in support of this view is found in the language of other acts of Congress upon the same and similar subjects. The commission representing the government undoubtedly had in mind that the disposition of lands in the same condition as this land, should be the same in all the tribes. Section 22 of the Choctaw-Chickasaw Supplemental Agreement (32 Stat. L. 641) is as follows:

> "If any person whose name appears upon the rolls prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted *in his name,* and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas; *provided,* that the allotment thus to be made shall be selected by a duly appointed *administrator or executor.*" (Italics by the writer.)

It is seen from this language that at least in the Choctaw and Chickasaw Nations the word "heirs" was not used in the *descriptio personae* sense, and

it seems clear that under that statute the provision requiring it to be allotted in the name of the deceased allottee, and also the provision that the allotment should be selected by a duly appointed administrator or executor, was intended to make it beyond question that the lands should be considered as having belonged to the allottee himself and actually descending to his heirs. As the Choctaw and Chickasaw Treaty was concluded only a few days after the Creek Supplemental Treaty, it is believed that the provisions of Section 7 of the Creek Treaty were intended to mean the same thing.

Further, Section 5 of the Act of April 26, 1906, (34 Stat. 137) provides that

> "all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions shall have been removed, his property shall descend to his heirs or his lawful assigns as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect."

Section 32 of the Act of June 25, 1910 (36 Stat. 855) is as follows:

> "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in

> pursuance of any Tribal Agreement or Act of Congress, to a person who had died, or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to, and become vested in the heirs, devisees or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life.

It is believed that these sections just quoted constitute a legislative interpretation of the language of Section 7 and show beyond question that it was the intention of Congress that the same persons should take as heirs under Section 7 (as well as under similar language in all treaties) as would have taken under a technical inheritance where the ancestor died after the allotment was made to him leaving the same persons surviving him as his heirs, and show that the word "heirs" was not used as *descriptio personae.*

The plaintiff in error contends the estate of Andrew J. Berryhill was a new acquisition.

Defendants in error, in Point Two of their brief, at page 38 thereof, assert the reverse of this proposition; and at this point begins the controversy between the parties. Counsel for defendants in error begin their argument under this point by asserting, as was asserted by the learned judge in the case of *Shulthis* v. *McDougal* (170 Fed. 529) that the Arkansas law of descent cannot be made to fit with technical precision the descent of Indian allotments, but

they do not point out, at least satisfactorily to the writer, the reasons why it does not fit with technical precision. If it be true, as contended by plaintiff in error, that no individual of the tribe had any title in the lands of the tribe, prior to allotment, then the Arkansas law does fit with technical precision, because a new estate was at that time created in the allottee.

The court will note that under the original Creek treaty no persons were entitled to enrollment or allotment except "all citizens who were living on the first day of April, 1899, entitled to be enrolled," etc., and "all children born to citizens so entitled to enrollment, up to and including the first day of July, 1900, and then living," etc. (31 Stat. 861, Sec. 28 Original Creek Treaty.)

Andrew J. Berryhill did not come within either of those classes. He was born in May, 1901, and lived until November, 1901, and his right to enrollment and to allotment was created by Section 7 of the Supplemental Creek Agreement. If that agreement had not been entered into, his birth and his Indian blood would not have entitled him to enrollment, and would not have entitled his father, George Franklin Berryhill, to any portion of the lands of the Creek Nation more than had already been conferred upon him by the original Creek treaty. Andrew J. Berryhill's right to enrollment as well as his allotment was created by this statute and was a new acquisition in him.

Members of the Creek Tribe who were living up until the first day of April A. D. 1899, but who died before that day, though it might be on the last hour of March 31, 1899, were not entitled to enrollment and had no share of the lands that could descend to any one, and as to children situated as was Andrew J. Berryhill, those born subsequent to July 1, 1900, but who had died at any time prior to May 25, 1901, though they had Indian blood, were not entitled to enrollment and had no interest in the lands that would descend to any person; so that not only does the Arkansas law of descent fit these cases but it fits them with technical precision, and it would seem with more than ordinary technical precision; because it would seem that such estates as Andrew J. Berryhill's were new acquisitions in the strongest sense of the term. Merely being a member of the tribe carried with it NO PROPERTY RIGHT.

In the case of *Franklin* v. *Lynch*, 223 U. S. 269, this court, speaking by Mr. Justice LAMAR, said that

> "the statute did not authorize white *members* of the tribe to sell future acquired property but did permit non-Indian *allottees* to sell what had been actually assigned to them in severalty. Cf. 34 Stat. at L. Sec. 19, p. 144, Chap. 1876. The distinction between a *member* and an *allottee* is not *verbal*, but was made in recognition of a definite policy in reference to these lands. The revised statutes (Sec. 2118) declare that no conveyance from an Indian Tribe shall be of any validity in law or in equity unless authorized

by treaty. As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor a vendible interest in any particular tract."

IT IS THE CONTENTION OF PLAINTIFF IN ERROR THAT THE TREATIES PROVIDING THE DATE ON WHICH ALL LIVING MEMBERS SHOULD BE ENROLLED FOR ALLOTMENT PLACED EACH MEMBER ON A PARITY AND WAS INTENDED TO CREATE, WHEN THE ENROLLMENT ACTS WERE COMPLIED WITH, A NEW ESTATE IN EACH MEMBER OF THE TRIBE TAKING AN ALLOTMENT AND THAT THE TITLE PREVIOUSLY HELD BY THE TRIBE AS A POLITICAL SOCIETY WAS EXTINGUISHED AND A NEW TITLE CONVEYED TO THE ALLOTTEE. THAT THE NEW TITLE WAS CREATED BY THE TREATIES AND PATENT AND WAS IN EVERY SENSE OF THE WORD A NEW ACQUISITION.

The case of *Kelly* v. *McGuire* (15 Ark. 555) has been quoted and re-quoted to this court, and to every other court that has ever had anything to do with these Indian questions. (The back is off the volume the writer is now referring to though the balance of the same set is in very good condition), but it is hard to see where the defendants in error get any consolation out of that case. It is said near the beginning of the opinion (page 584):

"The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions and qualifications hereafter more particularly noticed, *and these exceptions refer to real estate alone.*" (The italics are by the writer.)

But at page 586 where the court passes to the consideration of the 10th section, it is shown what exceptions are referred to and it is clear that a new acquisition did not follow the line of descent marked out in the first section. This case, as stated in the original brief, has been followed from the time it was written to the present time, and it is believed to be a learned and able opinion. Certainly if it had become the settled law of Arkansas at the time the Arkansas statute of descent was extended in Indian Territory, it should be followed by the courts in construing the Arkansas statute. (*Adkins* v. *Arnold*, U.S. Sup., decided Dec. 14, 1914.) *Kelly* v. *Mc. Guire*, was referred to in the case of *Martin* v. *Martin*, 135 S. W. 349, decided February 20, 1911. In that case the court refers to the decision in *Brown* v. *Whaley*, 58 Ohio St. 654; 65 Amer. St. Reports, 793, where it was said that a deed of real estate from a father and mother to their daughter in consideration of love and affection and dutiful obedience and faithful service and in further consideration of one dollar, was not a deed of gift and that title so acquired came to the daughter not by deed of gift but by purchase. The rule on this subject is laid

down in Walker's American Law, (11th ed. Sec. 188, p. 409) as follows:

> "Our statutes divide all property for inheritance purposes into two classes: namely: *1.* Real estate which came to the intestate 'by descent, devise, or deed of gift from an ancestor;' and *2.* All other real estate, and also all personalty from whatever source derived. For convenience, the first class is generally called ANCESTRAL, and the second *non-ancestral* property. By *ancestral property,* then, is meant that realty which came to the intestate from his ancestor, *in consideration of blood,* and without a pecuniary equivalent, and which must have come either by descent or devise from a now dead ancestor, or by deed of actual gift from a living one. And by *non-ancestral property* is meant all personalty, and that realty which came to the intestate in any other way, whether by purchase from his ancestor or from a stranger, for an equivalent paid, or by actual gift from a stranger, so that the consideration of blood is out of the question; for this makes the sole distinction. Ancestor means one from whom the estate is inheritable, hence it may refer to a brother or uncle, but not to a deceased husband or wife, for the survivor did not inherit from the other in right of blood, and the term 'ancestor from whom the estate came' means the *immediate* ancestor.
>
> In determining what is ancestral property, the legal title controls. It is paramount to the equitable title, and to all extraneous evidence. Thus, if the legal and equitable titles come by separate channels to unite in the same person, the latter is merged in the former and follows

the course of descent that an exclusively legal derivation would have dictated. So if a deed expresses a valuable consideration, the title is one by purchase, and therefore non-ancestral, and parol evidence is not competent to show that it was, in fact, a deed of gift, and thus change the descent. A seeming exception occurs where heirs, owning inherited land in common, partition it by mutual deeds reciting money considerations. The ancestral quality of the estate remains, but this is because such partition, like that by decree, creates no new title. If one tenant in common in a partition case elects to take the land at its appraisement the share which he inherited is ancestral, and the acquired shares are by purchase and non-ancestral. But if two heirs, after partition, exchange deeds, both titles become non-ancestral, being held by purchase."

If the rule thus laid down by Mr. Walker is the true rule, then whatever equitable rights members of the tribe may have had in their lands did not affect the question. However, it is not believed that the members of the tribe had any equitable rights in the technical sense of the term. It is not believed that this court, when it used the language in the case of *Choate* v. *Trapp*, 224 U. S. 671, quoted at page 62 of brief of defendant in error as follows: "The individual Indian had no title or enforceable right in the tribal property but as one of those entitled to occupy the land he would have an equitable interest, which Congress recognized and which it desired to have satisfied and extinguished," intended

to say or to mean that the individual Indian had any equitable title to the land of any sort. It is believed that this court meant to say that the individual had a right which equity required Congress to recognize, but did not mean to say that he had a right that courts could recognize or that could pass to any one else until Congress had enacted some legislation establishing the right which equity, not in the technical sense, but in the sense of natural justice, required should be established.

The construction of the Arkansas statute contended for by plaintiff in error is established by a long line of Arkansas cases as well as cases from other courts. This construction should not be departed from by this court unless reason and technical reason demands it. There is nothing in Indian habits to require a departure from the established construction. It is not necessary to argue to this court the danger of departing from established constructions. To do so would render titles uncertain, rights unsafe, make it impossible for lawyers to advise clients with certainty or for *nisi prius* courts, who must depend for the law upon the decisions of higher courts and the language used in the decisions of higher courts and in the statutes, to know how to try cases.

The Supreme Court of Oklahoma held recently in the case of *Simpkins* v. *Ware* (145 Pac. 355) that a member of the Osage tribe of Indians had no interest in the lands of the tribe prior to the act pro-

viding for the enrollment and allotment of the members. That is the principle contended for here and it is further contended that the allotment act created the right of each allottee and that George Franklin Berryhill, the father, had no more to do with giving the land in controversy than any other member of the tribe.

Defendants in error argue that individuals had a right of occupancy in severalty which was descendible, and in which homestead rights existed; and they print an appendix to their brief, containing numerous decisions by the Creek courts with reference to homestead and inheritance rights in these rights of occupancy.

These decisions do not affect the question involved here. The tribe could, of course, regulate the right of occupancy, but it could not convey an individual title or interest in the land occupied. The title by which the tribe held the lands must be looked to for a solution of the question involved here. No light can be obtained from tribal laws regulating the occupancy of the surface which could not affect and did not purport to affect the title to the land.

Rule of Property.

The able counsel for defendants in error do not show much disposition in their brief to uphold the doctrine of "rule of property" laid down by the Supreme Court of Oklahoma in the case of *Pigeon*

v. *Buck*, but they refer to the case of *Thorn* v. *Cone*, decided by the Supreme Court of Oklahoma in which the rule laid down in *Shulthis* v. *McDougal* has been followed. That rule has also been followed in another case since the original brief was prepared herein, to-wit: the case of *Lovett* v. *Jeter*, 145 Pac. 334, but this court will see upon reading the opinion in that case that the district judge who tried the case below had refused to follow *Shulthis* v. *McDougal*, and it bears out the theory of plaintiff in error that the decision in *Shulthis* v. *McDougal* never became a rule of property in the State of Oklahoma.

The argument made by counsel for defendants in error that if *Shulthis* v. *McDougal* should not be followed or sustained in this court, that titles to inherited lands would be scattered and would give collateral relatives small parcels or small interests of small value, might appeal to the legislative department of the government if the case were before that department, but it cannot affect this court, if the law provides that the title shall be divided. The argument of inconvenience cannot be resorted to except as a last resort, and is not believed to have any application at all in a case of this kind. However, the argument made is not believed to be sound. The intelligent heirs who know the value of their interests will be able to protect themselves by refusing to sell for less than their true value, the probate courts will be able to see that minor heirs get

value for their interests, persons not so able to take care of themselves or so well protected will in some instances be defrauded, just as they have been in entirely too many instances defrauded out of their own allotments when they owned the entire interest. In many cases the multiplicity of interests has been a protection to all, for out of the number some one would know the value and advise the others interested. It does not take a high grade of business ability for a man to know that his eighth of a tract is worth as much as another man's eighth and to insist on getting it. But as stated in the original brief herein, practically all of the land of this sort has been sold, and sold on the theory that the parent only owned a life estate. To confirm such titles into fee simple estates would give the purchaser something the parent did not think he was selling, for a price less than he would have had to pay the parent had the parent believed he was conveying the fee simple.

It is respectfully submitted that this case should be reversed as requested in the original brief herein filed by plaintiff in error.

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